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In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

PETER J. BRENNAN, SECRETARY OF LABOR, PETITIONER

v.

ROBERT HALL CLOTHES, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App. A, *infra*, pp. 19-39) are reported at 473 F.2d 589. The opinion of the district court (App. C, *infra*, pp. 42-72) is reported at 326 F. Supp. 1264.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1973 (App. B, *infra*, pp. 40-41). On

April 30, 1973, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including June 5, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employer who, allegedly on the basis of comparative departmental sales and profit margins, pays a lower base salary to saleswomen in its female clothing department than it pays to salesmen performing essentially the same job in its more profitable male clothing department, violates the equal pay provisions of the Fair Labor Standards Act, 29 U.S.C. 206(d)(1).

STATUTES INVOLVED

Section 6(d)(1) of the Fair Labor Standards Act, as amended, 77 Stat. 56, 29 U.S.C. 206(d)(1), provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except

where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Section 6(d)(3) of the Fair Labor Standards Act, as amended, 77 Stat. 57, 29 U.S.C. 206(d)(3), provides:

> For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this Act.

STATEMENT

The present action was commenced by the Secretary of Labor in the United States District Court for the District of Delaware to enjoin Robert Hall from paying lower wages to the saleswomen working in the female clothing department of its Greenbank Road store ("Greenbank") in Wilmington, Delaware, than it pays to the salesmen doing essentially equal work in the male clothing department of that store. The Secretary alleged that the wage differential discriminated against saleswomen on the basis of sex in violation of the equal pay provisions of the Fair Labor Standards Act, known as the Equal Pay Act

(29 U.S.C. 206(d)(1)), and sought to restrain respondents from further violating the Act and from withholding back pay due to saleswomen because of past violations. The district court found that, except for the single full-time salesclerk in each clothing department, the respondents had discriminated against their saleswomen on the basis of sex by paying them lesser wages than were paid to the salesmen doing essentially equal work (App. C, *infra*, pp. 66-69); it granted the injunctive relief requested.[1] A divided court of appeals reversed the granting of relief (App. A, *infra*, pp. 19-39).[2]

The essential facts are set forth in the opinion of the district court. Robert Hall opened the doors of its Greenbank retail clothing store in 1962. The store is divided by a center aisle into two departments, one carrying men's and boys' apparel and the other carrying women's and girls' apparel (A. 25, 491-492).[3] Only male sales personnel work in the men's department and only female sales personnel

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[1] The court "denied as a matter of discretion" (App. C, *infra*, p. 71) the request that respondents be held liable for interest on the wages which should have been paid to the saleswomen but were not.

[2] The court of appeals affirmed that part of the district court's decision upholding under the Act the wage differential between the full-time salesclerks.

[3] "A" references are to the joint appendix filed in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

work in the ladies' department (A. 494).[4] From the outset, the store has paid its male employees a higher salary than it has paid its female employees. The senior vice president of the company testified that this wage differential was based initially on Robert Hall's experience in its other stores, where the salesmen in its men's departments on the average generated higher dollar sales and greater profit margins than were generated by the average saleswoman in its ladies' departments (A. 296h, 301, 321-322). As pointed out by the district court, "the decision was simply a forward judgment based upon past facts" (App. C, *infra*, p. 64).[5]

The job description of the male and female salesclerks in the two clothing departments at Greenbank does not materially differ. Salesmen are engaged in selling men's and boys' apparel, such as top coats, sport jackets, suits, slacks, sweaters, shoes, underwear, and the like. Saleswomen sell a similar line

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[4] This employment policy is apparently prompted by the fact that there is frequent physical contact between the salesperson and the customer in connection with fitting clothes, which might cause embarrassment and inhibit sales if the salesperson and customer are not of the same sex (A. 296, 296a, 296c, 494).

[5] The senior vice president testified that it had long been Robert Hall's "policy" to pay salesmen in the men's department more than it paid saleswomen in the ladies' department "regardless of how short a time a man may have been employed or how long a woman may have been employed" (A. 291).

of women's and girls' apparel, including coats, suits, slacks, pants-suits, dresses, sweaters, blouses, undergarments, and the like (A. 503). Both the men and women employees use essentially the same selling techniques and are required to have basically the same knowledge about the merchandise carried in their departments, including the type of fabric, its quality and its wearability; they have similar responsibilities with respect to advising customers as to the appearance and the fit of various garments (A. 65, 72, 78-79, 128-129, 143-144, 147, 148, 155-157, 159, 193-198, 201-205, 220-223, 232-234).* In addition, they perform the same inventory, stock work and housekeeping duties (A. 95-97, 150-151, 205-206, 278-280).

The essential difference between the two departments is in the selling price of the merchandise. Clothing in the men's department carries, on the average, considerably higher markups and lower markdowns than are found in the ladies' department (A. 440-444, 480-482, 505, 511-512), and the aver-

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*While alterations were made on the men's clothing, but no alterations were made on the women's clothing, the male sales personnel generally did not mark the clothes that needed alteration; this was usually done by the manager or assistant manager (A. 167-169, 173, 185-186, 189-190, 233-235). Occasionally, salesmen did perform simple markings for alteration of cuffs, sleeves and waist (A. 99-100, 153-154, 228-230, 277, 284), but, as observed by the district court, such deviations from the basic policy "did not distinguish the job performed by salesmen from that performed by saleswomen to any significant degree" (App. C, *infra*, p. 60).

age unit selling price of men's apparel is well above that of women's apparel (A. 483-486, 502). For example, 60 percent of the men's suits and coats are priced above $39.95, as compared with only 20 percent of women's suits and coats that sell for more than that amount (A. 242, 420-432, 501-502).[7] Consequently, it was estimated that the saleswomen would have to sell from 40 to 50 percent more items than the salesmen in order for their department to generate the same volume of sales in dollars and cents (A. 456-477).[8] And, on an individual basis, the senior vice president of Robert Hall testified that only "an excellent saleswoman might generate more sales than a very poor salesman, but normally, under

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[7] Moreover, because men's clothing is less subject to changes in fashion, its selling price remains more stable than the prices of women's apparel, which must be reduced, often substantially, as changes in fashion occur (A. 505, 511-512).

[8] Respondents introduced at trial sales data (compiled from information used to compute employees' incentive pay) covering two ten-week periods in 1969 (January 26-April 15 and August 10-October 18) for which data were available (A. 456, 462, 467, 473). It showed that during these periods the men, as a group, had a larger dollar sales volume than did the women, despite the fact that some of the saleswomen sold many more items than did their counterparts in the men's department (A. 456, 462, 467, 473). The single full-time salesman had 43 to 65 percent more gross sales per hour (in terms of dollars) than the single full-time saleswoman, and the part-time salesmen had 8 to 20 percent more gross sales per hour (in terms of dollars) than the part-time saleswomen (*ibid.*)

normal circumstances, this would not happen" (A. 320).[9]

Respondents were thus able to show at trial that the men's department at the Greenbank store produced a larger gross profit per hour than the ladies' department in each of the years from 1963 to 1969 (A. 450, 487). On the basis of 1969 "profitability" figures, computed by respondents after trial to support their motion for reargument,[10] the average difference in profit margin was generally between $4.00 and $5.00 per hour (A. 525-536).[11] Another exhibit

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[9] Apparently, three of the five part-time saleswomen at the Greenbank store were "excellent". During the two ten-week periods in 1969 for which sales data are available, the dollar sales volume of these three women exceeded that of three part-time salesmen; indeed, during the period January 26 to April 15, 1969, one part-time saleswoman, Miss Andress, did as well as or better than all five of the part-time salesmen (A. 456, 462, 467, 473).

[10] The motion for reargument was denied by the district court in a brief memorandum opinion reproduced at App. D, *infra*, pp. 73-74.

[11] No records were kept of individual profit figures for sales personnel (A. 321, 335-336). Respondents, however, derived unadjusted "profitability" figures from available data pertaining to the two ten-week periods in 1969. It calculated an average percent of profit generated by each department in 1969, and then applied that percentage to the dollar sales volume during the two ten-week periods attributable to each part-time salesclerk in the department. When these "profitibility" figures are adjusted to reflect various cost factors (A. 453), they reveal that the salesmen had an average group profit of $17.23 per hour between January 26 and April 15, and an average group profit of $17.91 per hour between August 10 and October 18. This compares with

showed that the store's percentage of gross profits to sales was substantially higher in the men's department (A. 451-453).[12] The senior vice president of Robert Hall acknowledged that the difference in dollar sales and profit margins of the two departments did not result from superior salesmanship on the part of the male employees (A. 320), but was due, instead, to the price differential between men's and ladies' wearing apparel (A. 352-355).

The district court held that economic considerations of the sort relied upon by Robert Hall do not justify its wage compensation disparity between part-time salesmen and saleswomen working in the Greenbank clothing store (App. C, *infra*, pp. 67-69). It found that the jobs performed in each department "required equal skill, effort and responsibility" (*id.* at p. 61, *infra*), within the meaning of the Equal Pay Act.[13] A comparison of aggregate dollar sales and profit margins generated by the two departments, belatedly computed from incomplete sales rec-

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similar hourly profit figures for the saleswomen of $12.04 and $14.01 during the respective periods (A. 525-536).

[12] Respondents manufactured much of their own men's wear (A. 337-342). In determining the gross profit derived from the sale of their own production (men's coats, suits, etc.), respondents deducted from the sales figures the cost of production, with only "a slight book profit" for their factory (A. 336-338, 340, 342-352).

[13] This aspect of the court's decision was not challenged by respondents on appeal.

ords, cannot, it concluded, serve as a "factor other than sex" to sustain under the Act the payment of wages to male sales personnel that exceed the wages paid to their female counterparts by a greater percentage than the percent by which average dollar sales per hour produced by those male employees exceed the average dollar sales per hour of those female employees (*id.* at pp. 67-68, *infra*).[14]

A divided court of appeals reversed in part (App. A, *infra*, pp. 19-39). The majority broadly construed the statutory language that excepts from the equal pay requirement wage differentials based on "any other factor other than sex" (29 U.S.C. 206(d)(1)(iv)) as permitting unequal pay in circumstances such as presented in this case. It held that "[t]he overwhelming evidence which showed that the men's department was more profitable than the women's was sufficient to justify the differences in base salary" (*id.* at p. 34, *infra*), both as to part-time and full-time sales personnel.

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[14] The district court did sustain the wage compensation disparity between the single *full-time* salesclerks in each department, since it found that the dollar sales per hour generated by the full-time salesman was, between January 26 and April 15, 1969, 65 percent more than the hourly dollar sales of the full-time saleswoman, whereas his compensation during that period was 22 percent greater than hers; similarly, between August 10 and October 18, 1969, the same salesman produced 43 percent more dollar sales per hour than the same saleswoman and received 14 percent more compensation (App. C, *infra*, pp. 66-67).

REASONS FOR GRANTING THE WRIT

This case raises important issues concerning the proper interpretation of the Equal Pay Act, 29 U.S.C. 206(d)(1). The court below, by a divided vote, has sanctioned the payment by employers in the retail industry of lower wages to female sales personnel than they pay to male sales personnel, notwithstanding that the men and women salesclerks hold similar jobs that require essentially equal work and responsibility. The decision, if left undisturbed, will have substantial impact on the female labor force in this country. The retail-sales industry not only employs 20.2 percent of all working women in the United States (U.S. Dept. of Commerce, Bureau of the Census, *1970 Current Population Reports*, Series P-60, No. 80, October 4, 1971, Table 57), but also maintains "the greatest difference * * * in the median earnings of men and women" employed in any of the major occupational groups.[15] In 1970, the differential between the median wage of full-time men and women sales employees was 44.8 percent (*1970 Current Population Reports, supra*, Table 59).

This Court has not yet considered the extent to which the Equal Pay Act permits retailers, without regard to individual job performance, to pay more

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[15] See Hearings before the Special Subcommittee on Labor of the House Committee on Education and Labor, on H.R. 3861 and Related Bills, Equal Pay Act, 88th Cong., 1st Sess., p. 17; Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on S. 882 and S. 910, Equal Pay Act of 1963, 88th Cong., 1st Sess., p. 28; see also 109 Cong. Rec. 4638, 10265.

to its salesmen than to its saleswomen simply because the department in which only men can work generates, from its more expensive items, higher dollar sales and profit margins than are produced in the women's department, which generally carries lower-priced merchandise. That question is presently pending in a large number of cases in the lower federal courts.[16] This controversy over the proper construction of the federal statute can and should be authoritatively determined by this Court in the present case.

1. The Equal Pay Act, 29 U.S.C. 206(d)(1), forbids employers to discriminate in the payment of employees' wages on the basis of sex, but permits wage differentials where the compensation discrepancy is attributable to "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex * * *." This case does not involve a sales commission system of compensation for individuals; instead, respondents and the court below rely on category iv to sustain the difference in wages paid to male and female salesclerks here for performance of the same work.

The statutory language in question—*i.e.*, "a differential based on any other factor other than sex"—is, standing alone, obviously broad. But the struc-

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[16] Approximately 43 cases are now pending against retailers charged with violating the Equal Pay Act, most of which involve in one way or another the issue presented here.

ture of the Act and its legislative history show that this category is not to be read in isolation; it is, instead, intended as a catchall provision, covering "factors" not individually listed in the statute but having the same essential characteristics as those that are expressly mentioned. As this Court stated recently in *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, No. 71-1647, decided May 14, 1973, slip op. 9: "It is, of course, a familiar canon of statutory construction that such clauses are to be read as bringing within a statute categories similar in type to those specifically enumerated."

In the Equal Pay Act, Congress made explicit reference to three "systems" under which unequal wages could be paid to men and women employees without violating the statutory ban on sex discrimination in this area. Each one bears a direct relationship to the *individual* performance or qualifications of each employee, based either on his or her (i) experience, (ii) ability, or (iii) production. This same limitation was contemplated for the final catchall clause. As Congressman Griffin stated on the floor of the House, the first three itemized exceptions "are really examples" of the type of "factors" that could be taken into consideration in working out wage differentials under the fourth category (109 Cong. Rec. 9203). Thus, discrepancies in the compensation of men and women employees must, to survive under the Equal Pay Act, reflect in some measure the individual job performance, or qualifications for the job,

of each employee.[17] To construe the general language of 29 U.S.C. 206(d)(1)(iv) more broadly would allow "the exception [to] swallow the rule," and thus defeat the basic purpose of the Act to alleviate "the economic and social consequences of disparate wages paid to a major portion of the Nation's labor force." *Shultz* v. *First Victoria National Bank*, 420 F.2d 648, 657 (C.A. 5); and see *Shultz* v. *Wheaton Glass Company*, 421 F.2d 259, 265-267 (C.A. 3), certiorari denied, 398 U.S. 905.

2. The present situation is a case in point. Robert Hall seeks to justify the wage differences between its male and female sales personnel solely on the basis of *department* sales and profits. But the departmental figures differ, not because the salesmen outperform the saleswomen even in the aggregate, but because men's clothing is generally more expensive than ladies' clothing. The result is that, because

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[17] Thus, as reflected in the House Report on the equal pay provisions (H. Rep. No. 309, 88th Cong., 1st Sess., p. 3) and in the legislative debates, the types of "factors" considered to be cognizable under the catchall clause included such things as shift differentials, temporary assignments, participation in bona fide training programs, differences based on experience, training or ability, and the like. 109 Cong. Rec. 9206, 9210. Conversely, "factors" bearing absolutely no relationship to individual performance or job qualifications, such as an employee's status as head of the household, or as parent of eight or nine children, were not intended to serve as a basis for wage differentials. 109 Cong. Rec. 9206. See generally 29 C.F.R. 800.149, which states that an employee's status as "head of household" or "head of family" does not qualify as a "factor other than sex" within the intended meaning of the statute.

saleswomen are not permitted to sell the higher-priced men's merchandise (Pet. App. A, *infra*, p. 22), they are, under the ruling below, locked into a lower wage bracket than their male counterparts, despite the fact that some of the saleswomen may individually do a greater dollar volume of business (see n. 9, *supra*).

This, we submit, is impermissible sex discrimination in the payment of wages which Congress never intended to exempt from coverage of the Equal Pay Act. See *Hodgson* v. *Brookhaven General Hospital*, 436 F.2d 719, 726 (C.A. 5). Whatever legitimate business reasons respondents might have for segregating their male and female salesclerks (see n. 4, *supra*), those reasons do not sustain the payment of disparate wages for what is essentially equal work under the statute. And, since there is no basis here for distinctions to be drawn in terms of individual job performance, it is no answer in these circumstances to point to certain "economic benefits" derived, in the aggregate, from sales of the more expensive merchandise to justify a wage compensation discrepancy.[18] Just as is true with respect to initial

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[18] While respondents claimed below that they derived greater "economic benefits" from their Greenbank men's department than from the ladies' department, this so-called "benefit" was expressed only in terms of dollar sales and profitability. In terms of the store's economic well-being, however, it may well be more significant to determine which department attracted the most customers to the store. Also, since the record shows that the ladies' department handles large quantities of clothing subject to sudden fashion changes,

hiring practices, so, too, in setting employees' wages, the employer may not rely on factors "neutral on their face, and * * * in terms of intent" if they "operate * * * to discriminate on the basis of [some] impermissible classification" and "cannot be shown to be related to job performance." *Griggs* v. *Duke Power Company*, 401 U.S. 424, 430-431.[19]

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that department's turnover rate could well be important to the store's continued economic success. Respondent failed to introduce evidence bearing on these considerations in connection with its "economic benefits" claim.

[19] The court below suggests that its earlier decision in *Shultz* v. *Wheaton Glass Company, supra,* supports the acceptance of a wage differential based on "economic benefits" unrelated to job performance. There, however, the court was concerned with the separate question whether the company's male and female employees were performing "equal work" within the meaning of the Equal Pay Act. The focus of inquiry was specifically directed at job performance. It was in that context that the Third Circuit held in *Wheaton Glass* (421 F.2d at 264) that certain duties performed by the male selector-packers had insufficient "economic value" to the employer to differentiate their work from that performed by the women. The issue presented in the case at bar was not before the court.

Nor do we agree with the court of appeals that support for its position can be found in interpretative directives of the Department of Labor (App. A, *infra,* pp. 28-29). It refers to the Secretary's approval of a commission system whereby the commission is determined by the type of article sold. Such a system will be sanctioned under the Act only "if the employer can show that the commission rates paid in each department are applied equally to the employees of both sexes * * * for all employment in that department and that the factor of sex has played no part in the setting of the different commission rates." 29 C.F.R. 800.116(e). Of course, under a commission system, the amount of compensation

3. Moreover, the statutory language clearly states that, whatever "other factor other than sex" might properly be relied upon for purposes of coming within the catchall exception to the Act's coverage, the wage differential between men and women *must be based thereon* to be exempt from the statute's operative provisions.

In the present case Robert Hall introduced no evidence showing that the wage discrepancy between its male and female salesclerks was, directly or indirectly, "based on" (29 U.S.C. 206(d)(1)(iv)) the other factors on which it purportedly relies—*i.e.*, the dollar sales and profit margins generated by each department. No correlation was shown to exist, for example, between departmental profitability figures, on the one hand, and the employee's rate of compensation, on the other.[20] All that the record reveals, as the court of appeals observed (App. A, p. 34, *infra*),

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relates directly to individual job performance. Here, by contrast, Robert Hall did not use such a system for compensating its employees at the Greenbank store, but paid a lower *base salary* to its women employees than to its men employees without regard to individual job performance.

[20] The gross profits of the men's department were approximately 7½ percent to 12¼ percent higher than those of the women's department over the period from 1963 to 1969 (App. A, p. 21, n. 1, *infra*). This compares with a base salary for the full-time salesman which, during the same period, exceeded the base salary of the full-time saleswoman by 55 percent to 34 percent, and a base salary for the part-time salesmen in excess of the base salary for the part-time saleswomen by between 35 percent and 18 percent (App. C, p. 51, *infra*).

is that "the men's department was more profitable than the women's * * *." But that circumstance—even assuming *arguendo* that it can in the present context be regarded as a "factor other than sex" within the ambit of the final statutory exception clause—is of little significance under the Equal Pay Act if, as here, it does not serve as the basis for calculating the different salaries to be paid to those male employees selling men's clothing and to those female employees selling ladies' clothing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1973.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 71-1985, 71-1986

JAMES D. HODGSON, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR,
Appellant and Cross-Appellee

v.

ROBERT HALL CLOTHES, INC., a Corporation, and
ROBERT HALL CLOTHES GREENBANK ROAD CORP.,
a Corporation,
Appellees and Cross-Appellants

(D.C. Civil Action No. 3289)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Argued December 4, 1972
Before VAN DUSEN, GIBBONS and HUNTER,
Circuit Judges

OPINION OF THE COURT

(Filed February 5, 1973)

HUNTER, *Circuit Judge.*

This case involves the application of the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1964). In view of the district court's well-written opinion reported at 326 F. Supp. 1264 (D. Del. 1971), we will not elaborate on the facts.

The Robert Hall store in question is located in wilmington, Delaware. It sells clothing, and contains a department for men's and boys' clothing and another department for women's and girls' clothing. The store is a one-floor building, and the departments are in separate portions of it.

The merchandise in the men's department was, on the average, of higher price and better quality than the merchandise in the women's department; and Robert Hall's profit margin on the men's clothing was higher than its margin on the women's clothing. Consequently, the men's department at all times showed a larger dollar volume in gross sales, and a greater

gross profit.[1] Breaking this down, the salespeople in the men's department, on the average, sold more merchandise in terms of dollars and produced more gross profit than did the people in the women's department per hour of work.[2]

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[1] The following table from the district court's opinion is instructive:

Re: GREENBANK ROAD STORE
SCHEDULE OF SALES AND GROSS PROFITS
BY DEPARTMENT

Fiscal Year Ended June 30	Men's and Boys' Clothing Dept. Sales	Profit Gross	Gross Profit %	Ladies' and Girls' Clothing Dept. Sales	Gross Profit	Gross Profit %
1963	$210,639.48	$ 85,328.48	40.51	$177,742.17	$58,547.13	32.92
1964	178,867.50	73,608.08	41.16	142,788.22	44,612.12	31.24
1965	206,472.98	89,930.00	43.55	148,252.90	49,608.08	33.46
1966	217,765.79	97,447.54	44.74	166,479.47	55,463,29	33.31
1967	244,922.09	111,498.79	45.52	206,680.27	69,190.04	33.47
1968	263,663.53	123,681.60	46.90	230,156.63	79,846.92	34.69
1969	316,242.41	148,001.30	46.79	254,379.22	92,686.87	36.43

Hodgson v. *Robert Hall Clothes, Inc.*, 326 F. Supp. 1264, 1276 (Del. D.C. 1971).

[2]

SCHEDULE OF HOURLY SALES, EARNINGS AND GROSS PROFIT

Year	Sales Per Hour	Excess M over F	Earnings Per Hour	Excess M over F	Gross Profit Per Hour	Excess M over F
MEN's & BOYS'						
1963	38.31	40%	2.18	25%	15.52	72%
1964	40.22	32%	2.46	32%	16.55	74%
1965	54.77	64%	2.67	43%	23.85	114%
1966	59.58	73%	2.92	50%	26.65	134%
1967	63.14	71%	2.88	45%	28.74	133%
1968	62.27	70%	2.97	47%	29.21	127%
1969	73.00	77%	3.13	45%	34.16	127%
LADIES' & GIRLS'						
1963	27.31		1.75		9.00	
1964	30.36		1.86		9.49	
1965	33.30		1.80		11.14	
1966	34.31		1.95		11.43	
1967	36.92		1.98		12.36	
1968	37.20		2.02		12.91	
1969	41.26		2.16		15.03	

Hodgson v. *Robert Hall Clothes, Inc.*, *supra* at 1277.

The departments are staffed by full and part-time sales personnel. At all times, only men were permitted to work in the men's department and only women were permitted to work in the women's department. The complaint is not addressed to the propriety of such segregated employment.

The salespeople receive a base salary and can earn additional incentive payments. Various factors relating to the garment sold determine the amount of incentive payments.[3] At all times, the salesmen received higher salaries than the saleswomen. Both starting salaries and periodic increases were higher for the males. The amount of incentive compensation was slightly greater for the men.[4]

PROCEDURAL HISTORY

The Secretary of Labor brought this action against Robert Hall in 1966, pursuant to 29 U.S.C. § 217, claiming that since June 13, 1964 Robert Hall had been discriminating against the saleswomen on the basis of sex because it compensated them less than it compensated salesmen even though the saleswomen and the salesmen were performing equal work. If proven, this was a violation of 29 U.S.C. § 206(d)(1).[5]

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[3] These factors included style, quality, price, mark-up, and ease of selling specific merchandise involved. *Hodgson* v. *Robert Hall, Inc.*, supra at 1272, 1278.

[4] "The net effect of the incentive system, however, resulted in a ratio of incentive pay to gross sales which was approximately .2% more in the case of men than women." *Hodgson* v. *Robert Hall, Inc., supra* at 1272.

[5] That section provides:

> "No employer having employees subject to any provisions of this section shall discriminate, within any estab-

After a trial in late 1970, the district court filed its opinion on April 16, 1971. The court found that Robert Hall had a valid business reason for segregating its sales personnel, i.e., "the frequent necessity for physical contact between the sales persons and the customers which would embarrass both and would inhibit sales unless they were of the same sex." *Hodgson* v. *Robert Hall, supra* at 1269. However, it also found that this does not affect the application of the Equal Pay Act. It proceeded to hold that the sales personnel of each department performed equal work within the meaning of § 206(d)(1).

The question then facing it was whether Robert Hall could prove that the wage "differential was based on any other factor other than sex." 29 U.S.C. § 206(d)(iv). Robert Hall contended that its wage differentials were based on economic factors, i.e., the higher profitability of the men's department allowed it to pay the men more, and the lower profitability of the women's department forced Robert Hall to pay

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lishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 29 U.S.C. § 206(d)(1) 1964.

the workers in that department less. In support of this contention, Robert Hall introduced evidence of sales and profit margins from which the district court was able to make the findings in the tables previously quoted.

The district court accepted Robert Hall's contention that economic benefit to the employer could be a factor other than sex on which a wage differential could be based. But it decided that the figures for the average performance of each department were not sufficient to meet Robert Hall's burden of proof. The court held that the relevant figures were those relating to the economic benefit produced by each individual sales person. Although Robert Hall in the ordinary course of business retained no records from which such performance could be calculated, fortuitously there were records available for two ten week periods out of the six years involved in this suit. Based on this evidence, the court compared the performances of the full-time male to the performances of the full-time female and compared the performances of the part-time male to those of the part-time females.[6] It found that the full-time male was responsible for more dollar sales per hour of work than was the full-time female. In regard to the part-time personnel, the court found:

> "Two of Greenbank's part-time female employees, Alice Baker and C. Jarrell, were responsible for a higher per hour dollar volume of sales than three of the part-time male employees, McGonegal, Law and Layton, during the period from August 10, 1969 to October 18, 1969. A

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[6] At the times covered by the record, there was only one full-time sales person of each sex. For the first ten-week period there were five part-time males and four part-time females. For the second, five males and three females.

division of Jarrell's gross earnings (less incentive) by hours worked and a similar computation for the part-time salesmen discloses that Jarrell received a lower hourly rate than all three of these part-time salesmen, even though her gross sales per hour were more than that made by three of the five part-time salesmen." [7] *Hodgson* v. *Robert Hall, supra* at 1278.

On the basis of these findings, the district court held that the wage differential in favor of the part-time salesmen was not "supported by any economic benefits which defendants received from the job performances of the salesmen." *Id.* at 1278. Accordingly, if found in favor of the secretary as to the part-time personnel (and awarded them back wages) and in favor of Robert Hall as to the full-time personnel. It also found that the incentive compensation system was based on the kind of item sold and that this was a "factor other than sex." Therefore, it held against the Secretary on this point. In addition, it denied interest on its award in favor of the part-time personnel.

This disposition left no one completely satisfied. The Secretary appeals from the decision adverse to the full-time female personnel and against the award of interest, and Robert Hall appeals from the decision in favor of the part-time female personnel. The Secretary decided not to appeal from the holding that the

[7] Robert Hall claims that dollar volume of sales is not the most significant statistic. The most important statistic to it is the profit produced by the employee. While it is logical to assume that the salesmen could have produced more profit despite making fewer gross sales because of the higher profit margins on men's clothing, this statistic was not capable of calculation using the evidence available.

incentive system was based on a factor other than sex.

"ANY OTHER FACTOR OTHER THAN SEX"

The initial question facing us is one raised by the Secretary. He contends that economic benefit to the employer cannot be used to justify a wage differential under § 206(d)(1)(iv).

He argues that "any other factor" does not mean *any* other factor. Instead he claims it means any other factor other than sex which "is related to job performance or is typically used in setting wage scales." He contends that economic benefits to an employer do not fall within this exception.[8]

He recognizes that the men's department produces a greater profit for Robert Hall. His contention is that the salesmen have nothing to do with producing this benefit since the district court found that the salesmen and saleswomen performed equal work. Since the saleswomen cannot sell the higher-priced clothing sold in the men's department, this cannot be used

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[8] It would not be unreasonable to believe that economic benefit to the employer is a factor "typically used in setting wage scales" so that even the Secretary's test is passed. There was no proof on this below, however, because it appears that this is the first time the Secretary has offered this as a test. Then even if we were to accept the Secretary's test, it would seem only fair to send this case back to the district court for proof on this issue. The lack of notice to Robert Hall is evidenced in the way the Secretary proposed this test on this appeal. In his main brief, he stated his test to be "a factor . . . related to job performance." When Robert Hall pointed out that § 206(d)(1)(i), which permits a wage differential to be based on seniority, does not necessarily relate to job performance, the Secretary added the "or is typically used" language to his reply brief.

as a factor on which to base a wage differential. Otherwise, "the exception could swallow the rule." *Shultz* v. *First Victoria National Bank*, 420 F.2d 648 (5th Cir. 1969).

Robert Hall does not argue that "any other" means "any other" either. It claims that a wage differential is permissible if based on a legitimate business reason. As the district court found, economic benefits could justify a wage differential. We need go no further than to say the district court was correct to hold in this case that economic benefits to an employer can justify a wage differential.

The Secretary's argument is incorrect for several reasons. It ignores the basic finding of the district court that Robert Hall's segregation of its work force was done for legitimate business purposes. It is also inconsistent with the wording of the statute.

In providing for exceptions, the statute states that they will apply when the males and females are doing equal work. Congress thus intended to allow wage differentials even though the contrasted employers were performing equal work. However, two of the examples given as exceptions, (§ 206(d)(1)(ii and iii), may be read to say that the contrasted employees really are not performing equal work. If, for example, some employees produce a greater quantity of work than others, pursuant to §206(d)(1)(iii), they may receive greater compensation.

The Secretary's test might be acceptable if §§ 206(d)(1)(ii) and (iii) stood alone. However, §§ 206(d)(1)(i) and (iv) indicate that there must be some factors upon which an employer may base a wage differential which are not related to job performance. We must point to the plain wording of the clause. It reads "*any* other factor. . . ." While the examples preceding § 206(d)(1)(iv) necessarily qualify it to

some extent, they do not narrow it to the degree for which the Secretary contends.

The Secretary recognizes this reasoning in § 800.116 (e) of his Wage-Hour Administrator's Interpretative Bulletin and § 34d07 of his Field Office Handbook. In both of these the Secretary approves a commission system in which the amount of compensation is determined by the type of article sold.[9] The stated

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[9] The Bulletin states:

"Sec. 800.116(e) *Commissions.* The establishment of different rates of commission on different types of merchandise would not result in a violation of the Equal Pay provisions where the factor of sex provides no part of the basis for the differential. For example, suppose that a retail store maintains two shoe departments, each having employees of both sexes, that the shoes carried in the two departments differ in style, quality and price, and that the male and female sales clerks in the one department are performing 'equal work' with those in the other. In such a situation, a prohibited differential would not result from payment of a lower commission rate in the department where a lower price line with a lower mark-up is sold than in the other department where the merchandise is higher priced and has a higher markup, if the employer can show that the commission rates paid in each department are applied equally to employees of both sexes in the establishment for all employment in that department and that the factor of sex has played no part in the setting of different commission rates." (519-20)

The Handbook reads:

"34d07 *Commissions.* IB 800.116(e) provides that the establishment of different rates of commission on different types of merchandise will not result in a violation of Sec 6(d) where the factor of sex provides no part of the basis for the differential. Thus, even though it is determined that salesmen and saleswomen are performing equal work in selling differential merchandise

hypothesis is that the *sales people are performing equal work.* Since this is given, the only basis for approving such a system has to be that the economic benefit to the employer is greater. As the Field Office Handbook states, "Such a difference in commission rates might be based on many factors such as sales volume, markup, cost of the items sold, type of merchandise sold, turnover in merchandise, and the ease of selling merchandise in each particular department." These are all factors of value to the employer. It might take no more effort or skill to sell two different pairs of ten dollar shoes; but if the employer makes a four dollar profit on one pair as opposed to a two dollar profit on the other, the Secretary apparently allows a higher commission rate. That the salary in this case is a base salary rather than a commission is not a significant distinction. The principle remains the same: the compensation is based on economic benefit to the employer, and the work performed is equal.

This would make good business sense. The saleswomen are paid less because the commodities which they sell cannot bear the same selling costs that the commodities sold in the men's department can bear.

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in different departments the employer would not be in violation of Sec. 6(d) by paying different rates of commission on different merchandise where he can show that the differential is based on factors other than sex. Such a difference in commission rates *might be based on many factors such as sales volume, markup, cost of the items sold, type of merchandise sold, turnover in merchandise, and the ease of selling merchandise in each particular department.* If the employer applies such criteria in the same manner to employees of both sexes, the differential in rates would be based on factors other than sex." (488) (Emphasis added).

Without a more definite indication from Congress, it would not seem wise to impose the economic burden of higher compensation on employers. It could serve to weaken their competitive position. If anything, the legislative history supports a broader reading of § 206(d)(iv) than that proposed by the Secretary.

Representative Goodell, a key sponsor of the Act, said:

> ". . . [T]here are many factors that can be taken into consideration in working out differentials of pay among employees . . . which would be proper under this legislation so long as they were based on those factors and not on the basis of whether employees are women or men." 109 Cong. Rec. 9206.
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> * * * *
>
> "If he [the employer] has a reasonable standard of differentiation, the Labor Department is not to come in, even, and judge the reasonableness or unreasonableness of this differentiation among employees, except as it shows a clear pattern of discrimination against sex." 109 Cong. Rec. 9208 (1963).

Rep. Griffin stated:

> "I should like to focus the attention of the gentleman upon roman numeral iv, at the top of page 3 which makes clear and explicitly states that a *differential based on any factor or factors other than sex would not violate this legislation. In other words, even though jobs involve the same skill, equal effort, equal responsibility, and are performed under the same working conditions, if there is any other factor not based on sex upon which a differential is based, then no violation of this law can be found.* Roman numeral

> iv is a broad principle, and those preceding it are really examples: such factors as a seniority system, a merit system, or a system which measures earnings on the basis of quality or quantity of production. The other body saw fit to leave out references in the bill to a merit system, a system which measures on the basis of quality and quantity, and a seniority system, and included only the broad language found in roman numeral iv of our bill. However, it should be clear that under either bill a wage differential based upon any factor other than sex is not a violation." 109 Cong. Rec. 9203 (1963) (Rep. Griffin, R., Mich.) (emphasis supplied)

And the House Committee report states:

> "Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included." H. Rept. 309 88th Cong., 1st Sess. U.S. Code Cong. and Adm. News 689 (1963).

Our decision in *Shultz* v. *Wheaton Glass Co.*, 421 F.2d 259 (3d Cir. 1970), *cert. denied* 398 U.S. 905 (1970) also lends support to this result. In discussing whether the employer had met his burden of proving an exception to this act, we held against the employer partly because the record did not show that he had realized any greater economic benefits from certain additional activities allegedly performed by the male employees. While we did not specifically consider the issue of whether "economic benefit" falls

under the act, the decision implicitly accepts the fact that it does. *Shultz* v. *Wheaton Glass Co.*, *supra* at 267.

In addtion, this case comes to us on a finding by the district court that "the jobs performed by the salesmen and salesladies, respectively, are not reasonably susceptible of performance by both sexes because of the nature of the jobs." *Hodgson* v. *Robert Hall Clothes, Inc.*, *supra* at 1269. Although the fact that the jobs in question require employment of one sex exclusively may not alone justify a wage differential, it does seem to be a factor that can be considered in evaluating the employer's justification for his differential.

The Secretary claims that his test is required by the Supreme Court's decision in *Griggs* v. *Duke Power Co., Inc.*, 401 U.S. 424 (1971). In *Griggs*, the Supreme Court interpreted Title VII of the Civil Rights Act to mean that if a job requirement operates to exclude a disproportionate number of blacks and the jobs in question formerly had ben filled only by white employees as part of a longstanding practice of giving preference to whites, then the employer must show that the requirement is related to successful job performance to be able to use it. Although the Civil Rights Act and the Equal Pay Act are in *para materia*, *Shultz* v. *Wheaton Glass Co.*, *supra* at 266, *Griggs* is not applicable to this case. Robert Hall's segregation of its sales force was related to job performance, as found by the District Court. The Secretary does not contend that the segregation is impermissible, but only that the pay must be equal. *Griggs* did not deal with justification of a wage differential, and this is the issue we are considering.

BURDEN OF PROOF

The next question is whether Robert Hall proved that it received the economic benefits upon which it claimed it based its salary differentials. It is well-settled that the employer has the burden of proof on this issue. *E.g.*, *Shultz* v. *Wheaton Glass Company*, *supra* at 266.

Robert Hall introduced evidence to show that for every year of the store's operation, the men's department was substantially more profitable than the women's department. See tables on pg. 3.

Robert Hall contends that this greater profitability is a sufficient reason to justify paying the sales people in its men's department more than it pays the salespeople in its women's department. It does not have to tie its compensation scheme into the performance of the individual sales person, and this is what the district court implicitly required.

We agree that the district's court's opinion implies that such a correlation is necessary. It compared the individual performances of the full-time male and the full-time female. It also compared the individual performances of the part-time workers. *Hodgson* v. *Robert Hall Clothes, Inc.*, *supra* at 1278, 1280. See page 7 of this opinion. As we have mentioned, it was not Robert Hall's practice to retain records of individual performance. Fortuitously, the district court had before it the records of only two ten-week periods out of the six years in question here. Robert Hall questions the propriety of the district court's relying at all on these figures. It claims that these figures: (1) do not constitute a sufficient amount of evidence on which to base a finding; and (2) are not a representative sample.

Of course, it is the employer's burden to prove justification. Therefore, if the district court was correct in implicitly requiring Robert Hall to correlate wages with individual performance, Robert Hall cannot complain that there was not sufficient evidence available. This same reasoning applies to Robert Hall's complaint that the sample was not representative. Additionally, it does not seem unreasonable to us that in any comparison of individuals in these groups that there might be some saleswomen who had better statistics in some areas than some males had.[10] The question is whether the equal pay act requires the employer to justify his base salary by correlating it to individual performance.

The overwhelming evidence which showed that the men's department was more profitable than the women's was sufficient to justify the differences in base salary. These statistics proved that Robert Hall's wage differentials were not based on sex but instead fully supported the reasoned business judgment that the sellers of women's clothing could not be paid as much as the sellers of men's clothing. Robert Hall's executives testified that it was their practice to base their wage rates on these departmental figures.

While no business reason could justify a practice clearly prohibited by the act, the legislative history set forth above indicates a Congressional intent to allow reasonable business judgments to stand. It would be too great an economic and accounting hardship to impose upon Robert Hall the requirement that it correlate the wages of each individual with his or her performance. This could force it toward a system based totally upon commissions, and it

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[10] See footnote 7.

seems unwise to read such a result into § 206(d)(iv). Robert Hall's method of determining salaries does not show the "clear pattern of discrimination," (Rep. Goodell, 109 Cong. Rec. 9203), that would be necessary for us to make it correlate more precisely the salary of each of its employees to the economic benefit which it receives from them. Robert Hall introduced substantial evidence. This is not a case where if we sustain the proof as justification for a wage differential "the exception will swallow the rule." *Shultz* v. *First Victoria National Bank*, 420 F.2d 648, 656, 657 (5th Cir. 1969).

The Secretary contends that our decision in *Shultz* v. *Wheaton Glass Company*, *supra*, supports the district court's decision not to rely on group averages to justify the wage differential. *Cf. Hodgson* v. *Brookhaven General Hospital*, 436 F.2d 719, 725 (5th Cir. 1970) and *Shultz* v. *American Can Co.*, 424 F. 2d 356, 358, 360-61 (8th Cir. 1970). We do not agree that *Wheaton* supports the district court. In that case the question, in part, was whether additional duties allegedly performed by certain males would justify paying males more than females. The courts held that the employers had failed to show that all of the males performed the additional duties. Here all of the salesmen perform the same duties. One could analogize to *Wheaton Glass* and say that as the alleged justification there was the additional duties, the alleged justification here is the economic benefits. And as the employer there did not prove that each individual performed the duties here Robert Hall did not prove that each individual provided economic benefits. However, the nature of the proof required distinguishes the two cases. It would not have been difficult in *Wheaton* for the employer to

have proved that each or most male workers performed the additional duties. That is not the case here.

Also, in *Wheaton Glass*, the court relied on the fact that there had been no finding that the women workers could not perform the additional duties allegedly performed by the men. Here there was a specific finding by the district court, unchallenged by the Secretary, that the women could not perform the work done by the men.

Since we have determined that Robert Hall has not violated § 206(d)(1), we find it unnecessary to reach the question of whether the district court was correct in not awarding interest in this case.

The decision of that court will be affirmed as to the full-time personnel and reversed as to the part-time personnel.

VAN DUSEN, *Circuit Judge*, dissenting.

I respectfully dissent, since I believe the following findings of fact of the district court are not clearly erroneous: [1]

> "After listening to voluminous non-expert testimony for days on end concerning the differences and similarities between the jobs of salesmen and salesladies, the conclusion is warranted that such differences as existed were at best only incidental to the job of each when considered in its totality. The skill, effort and responsibility of each were substantially equal.

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[1] *See Krasnov* v. *Dinan*, 465 F.2d 1298, 1302 (3d Cir. 1972). I agree with the first 14 pages of the majority opinion.

"Plaintiff has borne the burden of proving by a preponderance of the evidence that defendants have discriminated between salesmen and saleswomen by paying to the latter wages at a lesser rate than paid to the former for equal work on jobs that required equal skill, effort and responsibility. Plaintiff has thus made out a prima facie case against defendant for violating the Equal Pay Act. Shultz v. Wheaton Glass Co., *supra*, p. 266."

Hodgson v. *Robert Hall Clothes, Inc.*, 326 F. Supp. 1264, 1275 (D. Del. 1971).

"The conclusion is warranted that the compensation disparity (apart from incentives) in favor of the part-time salesmen cannot be supported by any economic benefits which defendants received from the job performances of the salesmen. The difference in wage rates paid to the salesmen and saleswomen was not based upon factors other than sex."[2] *Hodgson*, *supra*, at 1278.

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[2] This language follows immediately after these basic findings:

"The wage compensation disparity between part-time salesmen and part-time saleswomen, excluding from consideration incentive payments, presents a different story. The part-time salesmen for the period January 26, 1969 to April 15, 1969 on the average were responsible for $44.79 of sales per hour as against $37.47 by saleswomen, or 20% more. The average part-time salesman was paid $1.93 per hour in wages as against $1.61 per hour to part-time saleswomen, or 20% more. For the period August 10, 1969 to October 18, 1969 the part-time salesmen generated on the average 46.43 dollars of sales per hour as against 43 dollars by saleswomen, or 8%

As this court stated in *Shultz* v. *Wheaton Glass Company*, 421 F.2d 259, 266-67 (3d Cir. 1970):

> "Under the statute, the burden of proof thereupon fell on the company to prove its claim that it came within exception (IV).[3] . . .
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> * * * *
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> "The burden of showing this properly rested on the company, for it invoked the defense that the differential was based on a factor other than sex. In cases such as this, where the justification for the differential rests on economic benefits, the company has peculiarly within its knowledge the means of proof, and the burden therefore is one which cannot be satisfied by general or conclusory assertions.
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> "We are, of course, bound by findings of fact unless they are clearly erroneous."

I would affirm the district court's order of April 16, 1971, except for the provision denying interest

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more. The average salesman was paid during the period $1.91 per hour in wages as against $1.65 per hour to saleswomen, or 16% more.

"In the case of part-time sales personnel no records of sales per hour were introduced in evidence for periods of time other than the two discussed. There is no suggestion that there was a deliberate destruction of records by defendants other than in the normal course of business. It is reasonable to infer that had the records been available their disclosure would not have been significantly different from that shown by the analysis of Dx 20-23, just discussed."

326 F. Supp. at 1278.

[3] "[A] differential based on any other factor other than sex." See 29 U.S.C. § 206(d)(1)(iv).

on back pay. See *Hodgson* v. *American Can Company*, 440 F.2d 916 (8th Cir. 1971); *cf. Hodgson* v. *American Bank of Commerce*, 447 F.2d 416 (5th Cir. 1971).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 71-1985 and 71-1986

JAMES D. HODGSON, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT in No. 71-1985 and APPELLEE in No. 71-1986

vs.

ROBERT HALL CLOTHES GREENBANK ROAD CORP. (Robert Hall Clothes, Inc., a corporation and Robert Hall Clothes Greenbank Road Corp., a corporation, APPELLANTS in No. 71-1986 and APPELLEES in No. 71-1985

(D. C. Civil Action No. 3289)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Present: VAN DUSEN, GIBBONS and HUNTER, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of

the said District Court, filed July 19, 1971, be, and the same is hereby affirmed as to the full-time personnel, and reversed as to the part-time personnel.

ATTEST:

Clerk

February 5, 1973

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Civil Action No. 3289

JAMES D. HODGSON, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

ROBERT HALL CLOTHES, INC., a corporation, and ROBERT HALL CLOTHES GREENBANK ROAD CORP., a corporation, DEFENDANTS

OPINION

STEEL, J.:

This case involves the application of the Equal Pay Act of 1963, 29 U.S.C. § 206(d), which was added as an amendment to the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 et seq. The Court has jurisdiction under 29 U.S.C. § 217 (1964).

The Equal Pay Act prohibits an employer from discriminating "within any establishment . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant

to . . . (iv) a differential based on any other factor other than sex. . . ." *

Invoking the enforcement provisions of the Act,* the Secretary of Labor brought this action against defendants, Robert Hall Clothes, Inc. and Robert Hall Clothes Greenbank Corp., claiming that since June 13, 1964 they have discriminated against saleswomen on the basis of sex by paying them at rates less than those paid to salesmen for equal work. The Secretary sought an injunction against future violations and the withholding of back pay.**

At all relevant times, defendant Robert Hall Clothes, Inc. (Robert Hall) has been a Delaware corporation with its main office in New York and defendant Robert Hall Clothes Greenbank Corp.

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* 29 U.S.C. § 206(d) (1964) The full provision reads:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

* 29 U.S.C. § 217.

** See 29 U.S.C. § 206(d)(3).

(Greenbank) has been a Delaware corporation having its place of business on Greenbank Road, Wilmington, Delaware. Greenbank is a wholly owned subsidiary of Robert Hall Clothes of Jamaica, Inc., which in turn is a wholly owned subsidiary of Robert Hall.

Greenbank first opened for business in September, 1962. It was and still is engaged in the operation of a retail clothing store which sells men's and boys' and ladies' and girls' clothing and apparel.

Robert Hall, as agent for Greenbank and other similar subsidiaries operating elsewhere, has exercised overall management, authority and control over Greenbank and has established for Greenbank overall policies relating to working conditions, working hours, rates of pay and other employment practices.

The business activities of the defendant corporations are related and are performed through unified operation and common control and for a common business purpose. They constitute an enterprise within the meaning of section 3(r) of the Fair Labor Standards Act. (29 U.S.C. § 203(r)).

The annual gross volume of sales of the enterprise is not less than $1 million. It purchases or receives goods for resale that move across state lines, amounting annually to $250,000 or more. The enterprise is engaged in commerce or in the production of goods for commerce within the meaning of section 3(s)(1) of the Fair Labor Standards Act. (29 U.S.C. § 203 (s)(1)

The men's and boys' department, and the ladies and girls' department at Greenbank are contained in one building. All men's and boys' merchandise sold in the one-floor store is located in the men's and boys' department which is on one side of the store, and all

ladies' and girls' merchandise sold in the store is located in the ladies' and girls' department which is on the other side of the store. The two departments are separated by a center aisle nine feet eight inches, running the length of the store from the front entrance to the cashier's desk. There are six ladies' dressing rooms located in the ladies' department and five men's dressing rooms located in the men's department.

There is a wrapping counter and a cashier booth at the rear of the store, and both cashiers and wrappers handle merchandise and service sales made by both salesmen and salesladies at this common counter. Similarly, there is a common stock room and receiving room where all merchandise for both ladies' and men's departments is received. There is the same approximate footage utilized for ladies' and girls' merchandise as for men's and boys' merchandise. The only customer entrance is the main entrance at the front of the store.

Sales personnel in the men's and boys' department (men's department) and sales personnel in the ladies' and girls' department (ladies' department) at the Greenbank store perform their activities under similar working conditions.

Neither the Equal Pay Act nor the decisions thereunder define "establishment" as used in the Act. The Administrator has interpreted the word to have the same meaning it has in § 213(a)(2) and elsewhere in the Fair Labor Standards Act. 29 C.F.R. § 800-.103. Section 213(a)(2) has been interpreted by the Secretary in 29 C.F.R. § 779.304, which states:

> The unit store ordinarily will constitute the establishment. . . . The mere fact that a store is departmentalized will not alter the rule.

The interpretation of the Administrator of an Act is entitled to great weight. *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 549 (1940); *Roland Electric Co.* v. *Walling*, 326 U.S. 657, 676 (1946); and see *Idaho Sheet Metal Works* v. *Wirtz*, 383 U.S. 190, 205 (1966). This is particularly true when the Administrator's interpretation, as here, represents the earliest contemporaneous construction of the statute by the authority charged with enforcing it. *American Trucking Ass'ns., supra*, p. 539.

Furthermore, in *Phillips* v. *Walling*, 324 U.S. 490, 496 (1945) the court stated:

> Congress used the word establishment [in section 213(a)(2)] as it is normally used in business and government—as meaning a distinct physical place of business. . . .

When the above definitions are applied to the layout and operations of Greenbank, it is clear that both departments constitute a part of a single establishment within the meaning of 29 U.S.C. § 206(d)(1).

At the outset three substantive questions must be decided: 1) does the Act apply where the nature of the jobs makes it impractical for both sexes to work interchangeably; 2) are the rates of wages which Greenbank pays to saleswomen less than those paid to salesmen; and 3) do saleswomen and salesmen perform equal work. If these three questions are answered in the affirmative, a fourth question must be decided, namely, whether the wage differential is based upon any factors other than sex.

1) Application of the Act to jobs which reasonably require performance exclusively by one sex

The jobs performed by salesmen and salesladies, respectively, are not reasonably susceptible of performance by both sexes because of the nature of the jobs. One is a "male" job and the other a "female" job. Defendants have always had a policy of having only salesmen in the men's and boys' department because of the frequent necessity for physical contact between the sales persons and the customers which would embarrass both and would inhibit sales unless they were of the same sex. Often the salesperson is required to assist with opening zippers; to touch the body of a customer near private parts in connection with the measurements of the crotch, seat, waist, chest or inseam; to touch other areas of the body while assisting in the try-on of a garment, and to observe the customer in various stages of undress in connection with try-ons. The question arises whether the Equal Pay Act was intended to apply to jobs which require employment by one or the other of the sexes exclusively.

Defendants contend that in such circumstances the Act does not apply. They rely upon 29 C.F.R. § 800.114 which states in paragraph (b):

> The legislative history of the Equal Pay Act expressly refers to the War Labor Board experience as furnishing a guide for testing 'the relationship between jobs' and determining 'equal work' and 'equal skills' for purposes of a 'practical' administration and application of the Act's 'equal pay policy' (see, e.g., S. Rept. 176, 88th Cong. 1st sess., to accompany S. 1409; H. Rept. 309, 88th Cong. 1st sess., to accompany H.R. 6060).

Accordingly, defendants cite War Labor Board cases which they say by analogy support their position. In *Shultz* v. *Wheaton Glass Co.*, 421 F.2d 259, 265 (3d Cir. 1969), *cert. den.* 398 U.S. 905, however, the court held that the use of the War Labor Board cases as guiding principles for interpreting the Equal Pay Act is not warranted.

Section 800.114 notes that wage classification systes which designate jobs as male jobs and other jobs as female jobs may contravene Title VII of the Civil Rights Act of 1964,

> except in these certain instances where sex is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise. (29 C.F.R. § 800.114 (a))

Defendants argue that the Administrator of the Equal Pay Act has thus recognized that a bona fide occupation qualification such as exists at bar was outside the contemplation of Congress when it enacted the Equal Pay Act. To interpret § 800.114 to mean that under no circumstances can a wage discrimination based on sex violate the Equal Pay Act unless it also violates the Civil Rights Act is not justified. The reference in § 800.114 to the Civil Rights Act is simply a caveat to employers that in certain circumstances violations of the Equal Pay Act may also impinge upon the Civil Rights Act. It is nothing more. Furthermore, the statement in § 800.114 that the Civil Rights Act does not reach situations where sex is a bona fide occupation qualification is at least questionable. 42 U.S.C. § 2000e-2(e) provides that it is not an unlawful employment practice for an employer to *hire and employ* employees on the

basis of sex provided that sex is a bona fide occupational qualification. No such exception appears in § 2000e-2(h) which relates to *compensation* discriminations based on sex. Whether under the Civil Rights Act compensation discrimination can be justified upon the basis of sex for the reason that sex is a bona fide occupational qualification depends upon the interpretation of the Equal Pay Act.* That is the question which must be determined without reference to the hiring and compensation practices permissible under 42 U.S.C. §§ 2000e-2(e) and (h), respectively.

Section 800.114 ** states that the Equal Pay Act was intended to cover both situations where male employees are replaced by females and where both sexes perform the same work concurrently and interchangeably. This interpretation of the Act by the Administrator is an affirmative declaration of practices violative of the Act. It cannot be read as limiting the coverage of the Act without disregarding the plain implications of the Equal Pay Act itself, as construed by the courts.

The wage rate discrimination at which the Equal Pay Act is aimed arises when substantially equal jobs are performed by male and female employees; the

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* The last sentence in 42 U.S.C. § 2000e-2(h) (Civil Rights Act) reads:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29. [Equal Pay Act]

** 29 C.F.R. § 800.114(b).

jobs need not be identical but only substantially equal. *Shultz* v. *Wheaton Glass Co., supra*, p. 265 *Shultz* v. *American Can Co.-Dixie Products*, 424 F.2d 356, 360-361 (8th Cir. 1970) and *Hodgson* v. *Brookhaven General Hospital*, 64 CCH Lab. Cas. ¶ 32,431 (5th Cir. 1970). The test for ascertaining whether the jobs are substantially equal is that prescribed by the statute as judicially interpreted, viz., whether they involve substantially equal skill, effort and responsibility. If they do, wage discrimination based upon sex is prohibited unless the discrimination is based upon one of the exceptions stated in § 6(d)(1) of the Act.

When properly read, the cases of *Wirtz* v. *Muskogee Jones Store Co.*, 293 F. Supp. 1034 (E. D. Okla. 1968) or *Shultz* v. *Kentucky Baptist Hospital*, 62 CCH Lab. Cas. 44,117 (W. D. Ky. 1969) do not hold, as defendants argue, that no violation of the Equal Pay Act can exist if the jobs performed by male employees cannot be reasonably performed by female employees, or vice versa. The act has no such meaning.

2) Pay Differential

Greenbank employs salesmen and salesladies who work regularly forty hours a week or more and salesmen and salesladies who perform their duties on a sporadic basis and work less than forty hours per week. The former are referred to as full-time and the latter as part-time employees. The full- and part-time sales employees in the men's department have always been exclusively male, and the full- and part-time sales employees in the ladies' department have always been exclusively female. When Greenbank opened in September 1962, it employed the following

sales personnel: two full-time females, fifteen part-time females, four full-time males, and twelve part-time males. By January 1963, the number of full-time sales personnel was reduced to two: one man and one woman. It has since remained at that figure.

The number of part-time sales personnel was pared down gradually during 1962 and 1963. It has since varied between two and five part-time salesmen and two and five part-time saleswomen, depending on the season.

At all times from the passage of the Act, the starting salaries for full-time salesmen at Greenbank have ranged between 21% and 55% higher than starting salaries for full-time saleswomen. The starting wage rate for part-time salesmen has likewise varied between 3% and 35% higher then that paid part-time saleswomen. See following Table 1:

Table 1—Starting *

	Full-Time (per week)			Part-Time (per hour)		
	M	F	% by which M exceeds F	M	F	% by which M exceeds F
9/5/62-8/30/64	$65	$42	55%	$1.42	$1.05	35%
8/31/64-9/2/65	67	46	46%	1.47	1.15	28%
9/3/65-1/31/67	67	50	34%	1.47	1.25	18%
2/1/67-4/13/70	67	50	34%	1.47	1.25	18%
4/13/70	75	62	21%	1.55	1.50	3%

* Figures in columns M and F are taken from Px 1, 2, 3, 4 and 26. The per cent figures arise from computation.

After the commencement of their employment, progressive increases were given to both male and female personnel, part-time and full-time, at specified intervals. These increases reflected compensation dif-

ferentials which favored salesmen over saleswomen, and ranged from 35% to 52% in the case of full-time personnel and between 16% and 34% for part-time personnel. See following Tables 2 and 3.*

Table 2—6 Months After Starting

	Full-Time (per week)			Part-Time (per hour)		
	M	F	% by which M exceeds F	M	F	% by which M exceeds F
9/5/62-8/30/64	$67	$44	52%	$1.47	$1.10	34%
8/31/64-9/2/65	70	48	46%	1.52	1.20	27%
9/3/65-1/31/67	70	52	35%	1.52	1.30	17%

Table 3—1 Year After Starting

	Full-Time (per week)			Part-Time (per hour)		
	M	F	% by which M exceeds F	M	F	% by which M exceeds F
9/5/62-8/30/64	$71	$48	48%	$1.57	$1.20	30%
8/31/64-9/2/65	73	50	46%	1.57	1.25	26%
9/3/65/1/31/67	73	54	35%	1.57	1.35	16%

* Figures in columns M and F are taken from Px 1, 2, and 3. The per cent figures arise from computation.

The progression schedules were eliminated effective February 1, 1967 and defendants began a program of periodic merit increases in sales personnel salary and wage rates based on the recommendation of the store manager. He would base his recommendation on the employee's performance, length of service, attitude, absenteeism, time since last increase and economic factors.

Incentive compensation was also paid salesmen and salesladies. This was based upon various factors such as type, number of garments sold to a given

customer at one time, price, age of garment, etc. The system in its ramifications was extremely complex (Plaintiff's exhibits 5-10). It was designed to move merchandise and increase profits. Since no inceptive rate existed for all male garments and all female garments, a direct comparison of rates is not possible. Different items of merchandise carry different amounts of incentive compensation. In both the men's and ladies departments, the sale of some low priced items of merchandise, if sold individually, will not earn the selling employee any incentive compensation; almost all of the merchandise in the stores when sold in multiple units (double-header) or in combination with other items to the same customer yield incentive compensation. Additionally, the incentive earned upon the sale of merchandise from a prior season may change from season to season, depending upon the length of time an item remains in the store. The longer it remains in the store, the higher the incentive when it is sold.

The particular amount of incentive compensation placed upon a particular item of merchandise, regardless in which department it is sold, is determined not by whom the item is sold, but on the need to sell the particular item, the markup on the item, the profitability to the store on the sale of the item, the length of time the item is in the store, the case of selling the item and its selling price.

In both men's and ladies' departments the higher the price of the merchandise the greater the incentive compensation. More high priced merchandise is carried in the men's department than in the ladies' department, i.e., 60% of the men's suits and coats are over $39.95, whereas 20% of ladies' coats and

suits are over $39.95. The average unit selling price of merchandise is substantially higher in the men's department than in the ladies' department.

Merchandise in the men's department remains in the store longer before it is sold than merchandise in the ladies' department. Merchandise sold in the ladies' department is more related to change in fashion, and consequently, is frequently removed and salvaged if not sold in the current season. Rarely is merchandise in the ladies' department retained which is more than two six-month seasons old. On the other hand, it is common for men's merchandise to date back four to six six-month seasons. Thus, there is reasonably a greater category breakdown in the incentive compensation payable upon the sale of men's stale merchandise then there is for ladies' stale merchandise, i.e., in the case of men's stale merchandise, there are four different age categories of merchandise; whereas in the case of ladies' stale merchandise, there are only two different age categories of merchandise; the older the merchandise within a category, the higher the incentive.

The net effect of the incentive system, however, resulted in a ratio of incentive pay to gross sales which was approximately .2% more in the case of men then women.

Under the Act the "wages" which must be paid at equal rates to both sexes if the work performed is equal include "all payments made to or on behalf of the employee as remuneration for employment." 29 C.F.R. § 800.110. The term wage "rate" used in the Act encompasses all rates of wages "whether calculated on a time, piece, job, incentive or other basis." 29 C.F.R. § 800.111. The Government has established by a preponderance of the evidence that Greenbank,

subject to one exception,* has paid saleswomen "wages" —starting, progressive and incentive—at "rates" less then those paid to salesmen.

3) Equality of Jobs

Salesmen are engaged in selling men's and boys' apparel such as top coats, sport coats, suits, slacks, sweaters, shoes, underwear, and furnishings, in sizes 2 through adult. Salesladies engaged in selling women's and girls' and infants' apparel, such as coats, dresses, suits, slacks, skirts, pants suits, sweaters, blouses, hosiery, and undergarments, in sizes 9 months through adult.

Obviously the jobs performed by salesmen and salesladies are not identical. Salesmen sell different merchandise from salesladies and the customers of salesmen are mostly men and boys whereas the customers of salesladies are mostly women and girls. These distinctions make the job different. They do not necessarily make the job unequal within the meaning of the Equal Pay Act. The Act does not require that the jobs performed be identical but only that they be substantially equal. *Shultz* v. *Wheaton Glass Co.* 421 F.2d 259 (3d Cir. 1970), *cert. den.*, 398 U.S. 905. See 29 C.F.R. § 800.120. This does not depend upon job classification but rather on actual job requirements. The jobs as a whole must be viewed over the entire work cycle. *Wirtz* v. *Rainbo Baking Co.*, 303 F.Supp. 1049, 1052 (E.D. Ky. 1967). Whether by this test the jobs of salesmen and saleswomen require substantially equal skill, effort and responsibility is the question to be resolved.

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* The record does not permit any finding to be made on the merit increases which were granted after February 1, 1967.

Both male and female sales personnel engage in selling the above described merchandise by applying sales techniques, basic knowledge of garments sold, materials, wearability, location of items in the store, and quality of garments stocked; by showing apparel to customers, engaging them in discussion about the merchandise, advising and answering questions as to appearance and fit, size, color, fabrics, appropriateness and quality of merchandise, all for the purpose of effecting a sale.

In hiring both male and female personnel consideration was given to the appearance of applicants and their response to questions submitted to them. There was no educational requirements for sales personnel of either sex.

Both salesmen and saleswomen perform the same inventory and stock work and housekeeping duties. They each move garments from the stockroom to the sales floor and make sure that the merchandise already on the floor is grouped according to size. After customer try-ons, both salesmen and salesladies put the garments back on the racks in their proper places.

Defendants argue that the job of selling in the men's department differs substantially from that in the women's department because of differences in the character, price, profitability, markup and markdown in the merchandise sold. Defendants also argue the job content of salesmen and saleswomen differs with respect to the type of training received, the work required of men in completing the back of the cash alterations sales slips, their alteration and fitting responsibilities and the use of sizing charts and tape measures in connection with fittings.

Generally speaking, the prices, profitability and markups were higher in men's wear than in women's

wear and the markdown differences were less in the case of men's wear than in women's wear. These variances, however, were not so great as to make any significant differences in the effort, skill and responsibility required between the salesmen and salesladies in performing their jobs.

The character of the merchandise sold by salesmen and saleswomen was likewise different in that the styles, colors and materials varied. Differences of this kind do not necessarily mean that the sale of one article requires a higher degree of skill, effort and responsibility than the sale of another, see 29 C.F.R. § 800.123, and in the instant case they did not. Although men's suits are manufactured in various models which give rise to fitting and sizing problems, just as varied styles existed among women's garments which resulted in comparable sizing and fitting complexities. The skill, effort and responsibility in knowing the styles, colors and materials were not greater in the case of men than they were for women.

For the most part differences in instructions given to male and female sales personnel were occasioned by the differences in the merchandise which they were to sell. The testimony of salesmen as to the training which they received was not consistent, and at best such training as they had appeared to be perfunctory and in some instances on a day by day, on the job basis. Such training differences as existed were a minor consideration when viewed against the substantial identity of the overall skill, effort and responsibility required of salesmen and salesladies.

As to fitting skill, effort and responsibility, some salesmen used a card which specified suit models of various types (Ivy, Bankers, Portly, etc.,) and related these types to waist and chest measurements of

customers. By using the card the salesmen were able to tell at a glance which model, from a fit standpoint, would be most appropriate for a customer. This was a simple operation. The saleswomen had no such aid. They were required visually and by experience to determine sizes and types of dresses which would be best suited from a style and fit standpoint for customers to wear for a particular purpose. The sizing card furnished salesmen reduced or at least minimized the skill required of them as against that demanded of saleswomen in size selection.

Because no alterations were made by the ladies' department, whereas alterations were made in the men's department, salesmen were required to use a tape measure in measuring customers but saleswomen were not. This was but a minor variance in duties and did not distinguish the salesmen's job in any appreciable way from that performed by the saleswomen.

Nor did the knowledge of alteration possibilities on men's clothing vary importantly from the knowledge of saleswomen of the same possibilities. Although no alterations were made in the women's department, the job of saleswomen made it necessary for them to advise their customers of the "at home" alteration potentials.

The major thrust of the defendants' argument that the jobs of both sexes were substantially unequal rests upon the asserted fact that the salesmen, unlike the saleswomen, had to mark men's clothing so that the tailor would know what work he should do. The job of marking men's clothing for alterations was especially important, defendants argue, because Greenbank made it a policy to guarantee the fit of all men's clothing for the life of the garment. Hence,

Greenbank was obligated to make additional alterations whenever the customer decided that the garment fitted him poorly, even if this occurred long after the date of purchase.

The basic premise of defendants' argument, i.e., that salesmen as a group had the responsibility of marking clothes for alteration is not borne out by the evidence. It discloses that marking was not uniformly performed by all the salesmen and that such marking as was done by some was subject to important qualifications.

The basic policy of Greenbank since opening in September of 1962 has been for either the manager or assistant manager to be called by a salesman to perform marking whenever alterations were required. This policy existed at least until January 10, 1968, when defendants' answer to plaintiff's initial interrogatory 21 was filed. It stated that male sales personnel did not engage in marking.*

It is true that at times the basic policy to have the manager or assistant manager mark the clothes has been deviated from. Such deviations as there were involved for the most part only simple and sporadic marking. Four of ten salesmen employed at the Greenbank store testified they performed no marking at all. Of the remaining six, three stated that their marking was limited to pants length, sleeve length and waist. Three other salesmen testified that they

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* A letter dated August 18, 1966 from Jerome H. Rockman, Director of Industrial Relations, Robert Hall Clothes, Inc. to Louis Weiner, Regional Solicitor, described the duties of individual salesmen and stated that:

> The salesman must go with the customer to the fitting section, comment and make suggestions to the fitter and the customer during the course of the fitting.

did more than this and also marked coat size, collars or crotch, but only if the manager or assistant manager were not available. The marking of cuffs, sleeves and waists was simple. At least two of the employees (Blawn and Steinebach) who performed this work did so within a few days after their employment.

The ability or inability of salesmen to mark clothes for alterations and the fact that they may have done so were not considered by defendants in fixing the wage differentials favoring salesmen. Considering the totality of the functions which salesmen and salesladies performed and the responsibilities which they assumed, such marking of clothes for alteration exclusively by salesmen as existed did not distinguish the job performed by salesmen from that performed by saleswomen to any significant degree.

Defendants point out that salesmen fill in the back of cash alteration sales slips and saleswomen do not. Again, this is a matter of job detail requiring merely the checking of spaces on the back of the alteration slip or making simple notations on it.

Dr. S. Herbert Unterberger testified as an expert that the work performed by salesmen and salesladies did not require equal skill, equal effort and equal responsibility. Mr. Thomas Kearney testified to the contrary. It is not necessary to evaluate this testimony. The determination whether the jobs of salesmen and saleswomen were substantially equal depends primarily upon a weighing of the testimony of fact witnesses, and the opinion of experts is of little help in resolving the question.

After listening to voluminous non-expert testimony for days on end concerning the differences and similarities between the jobs of salesmen and salesladies,

the conclusion is warranted that such differences as existed were at best only incidental to the job of each when considered in its totality. The skill, effort and responsibility of each were substantially equal.

Plaintiff has borne the burden of proving by a preponderance of the evidence that defendants have discriminated between salesmen and salesladies by paying to the latter wages at a lesser rate than paid to the former for equal work on jobs that required equal skill, effort and responsibility. Plaintiff has thus made out a prima facie case against defendant for violating the Equal Pay Act. *Shultz* v. *Wheaton Glass Co., supra,* p. 266.

Even though this be so, if the pay differential was justified by factors other than sex, as defendants claim, defendants have a valid defense under the Act. The defense is an affirmative one which the defendants have the burden of proving. *Shultz* v. *Wheaton Glass Co., supra,* p. 266. This must be done by a preponderance of the evidence.

4) Factors Other Than Sex

Defendants contend that the Act is violated only if a wage differential is based solely on sex and is justified by no other factor. This contention is unacceptable. Properly interpreted, the Act means that if the differential in pay is, in whole or in part, based upon sex, it is not based upon factors other than sex. Only if sex plays no part in the wage differential is it beyond the condemnation of the Act. 29 C.F.R. § 800.142.

Contrary views have been expressed. In *Kilpatrick* v. *Sweet,* 262 F.Supp. 561, 564 (M.D. Fla. 1967) the court said that "if there were any other factors other than sex upon which a difference in wages was

based, then no violation of the law could be found". See also *Shultz* v. *Kentucky Baptist Hospital*, 62 CCH Lab. Cas. 44,117, 44,123 (W.D. Ky. 1969). This construction of the Act is not required by its language and if adopted evasion of the Act would be easy and its remedial purpose would be thwarted.

Defendants argue that economic considerations were the sole reasons for the compensation differential between salesladies and salesmen and that sex had nothing to do with it. The difference in merchandise carried in the men's department and the relatively greater benefits which it is said that defendants experienced by the operation of that department lie at the root of this argument.

The merchandise carried in the men's department differed from that in the women's department in price, quality, style, markup and markdown. On the average more merchandise in the men's department is in the higher price range and of better quality than in the ladies' department; on the average the merchandise in the men's department carries a considerably higher markup and lesser markdown than that in the ladies' department; and, of course, styles in the men's merchandise differ from styles in the ladies' merchandise.

Defendants point to the fact that the sales in the men's department exceeded by several fold those in the ladies' department, and that the percentage of gross profit to sales in the former was substantially greater than in the latter. See DX 17, p. 1: *

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* The figures on the first page of Dx 17 were subject to certain minor adjustments as shown on the second and third pages of Dx 17.

Re: GREENBANK ROAD STORE
SCHEDULE OF SALES AND GROSS PROFITS
BY DEPARTMENT

Fiscal Year Ended June 30.	Men's and Boys' Clothing Dept.			Ladies' and Girls' Clothing Dept.		
	Sales	Gross Profit	Gross Profit %	Sales	Gross Profit	Profit % Gross
1963	$210,639.48	$ 85,328.48	40.51	$177,742.17	$58,547.13	32.92
1964	178,867.50	73,608.08	41.16	142,788.22	44,612.12	31.24
1965	206,472.93	89,930.00	43.55	148,252.90	49,608.08	33.46
1966	217,765.79	97,447.54	44.74	166,479.47	55,463.29	33.31
1967	244,922.09	111,498.79	45.52	206,680.27	69,190.04	33.47
1968	263,663.53	123,681.60	46.90	230,156.63	79,846.92	34.69
1969	316,242.41	148,001.30	46.79	254,379.22	92,686.87	36.43

In establishing pay rates Robert Hall did not consider the nature of the specific merchandise sold by individual employees and made no attempt to relate the specific wages of specific employees to specific merchandise. Silbert, the senior vice president and treasurer of Robert Hall, testified that the compensation differential at Greenbank was based upon the experience which Robert Hall had in its other stores and involved solely economic considerations which reflected the difference in merchandise sold. Greenbank was opened in 1962. In the case of every one of its other stores Robert Hall had learned that on the average each salesman generated per hour of work more sales dollars and more gross profit than the average saleswoman. Silbert said that it was solely because of this experience that Robert Hall, which fixed compensation policies for all of its retail stores, determined to pay the differential at Greenbank. He said that the decision was simply a forward judgment based upon past facts.

The defendants' prognostication that at Greenbank salesmen on the average per hour of work would sell more merchandise in terms of dollars and produce more gross profits than saleswomen was borne out by each year's operation at Greenbank. See DX 41, as supplemented by the Court.*

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* The supplementation by the Court consists of the addition to Dx 41 of three columns which show the percentages by which the sales per hour, earnings per hour and gross profits per hour of the average salesmen exceeded those of the average saleslady.

SCHEDULE OF HOURLY SALES, EARNINGS AND GROSS PROFIT

Year	Sales Per Hour	Excess M over F	Earnings Per Hour	Excess M over F	Gross Profit Per Hour	Excess M over F
MEN'S & BOYS'						
1963	38.31	40%	2.18	25%	15.52	72%
1964	40.22	32%	2.46	32%	16.55	74%
1965	54.77	64%	2.67	48%	23.85	114%
1966	59.58	73%	2.92	50%	26.66	134%
1967	63.14	71%	2.88	45%	28.74	133%
1968	62.27	70%	2.97	47%	29.21	127%
1969	73.00	77%	3.13	45%	34.16	127%
LADIES' & GIRLS'						
1963	27.31		1.75		9.00	
1964	30.36		1.86		9.49	
1965	33.30		1.80		11.14	
1966	34.31		1.95		11.43	
1967	36.92		1.98		12.36	
1968	37.20		2.02		12.91	
1969	41.26		2.16		15.03	

This tabulation is based on averages and does not reflect individual performances by the sales personnel. Standing alone, the greater amount paid to the average salesman per hour is amply justified by the greater amount of dollar volume per hour and gross profits per hour generated by the average salesman. These average figures, however, are less meaningful than they appear to be on the surface when other statistical data of record is analyzed with an eye to performance by and pay to full-time and part-time personnel, respectively.

This data may be found in defendants' exhibits 20-21 for the period January 26, 1969-April 15, 1969 and DX 22-23 for the period August 10, 1969-October 18, 1969. During these two periods Greenbank had only one full-time salesman, Robbins, and one full-time saleswoman, Donofrio. For the January 26, 1969-April 15, 1969 period Robbins earned $2.61 per hour, as against $2.14 per hour for Donofrio, incentive compensation being excluded in each instance.* Robbins' compensation was, therefore, 22% more than Donofrio's. The same exhibits show that for the same period Robbins was responsible for $83.40 per hour of sales as against $50.53 by Donofrio, or 65% more than Donofrio. A like comparison between Robbins and Donofrio for the period August 10, 1969 through October 18, 1969, DX 22 and 23, reveals that whereas Robbins generated 43% more gross sales per hour his compensation per hour was only 14% more per hour than Donofrio, again excluding incentive pay.**

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* The matter of incentive differential is discussed, infra p. 38, 39.

** These percentages are not shown on Dx 20-23 but represent computations by the Court from the exhibits.

The discussion thus far relates to a comparison between the wage rate of an individual full-time salesman and an individual full-time saleswoman for two limited periods in 1969. No comparable statistics are available of record for other periods. Sales checks made out by the individual sales employees from which dollar volumes could be ascertained were destroyed promptly after the district manager reviewed them. It was only a fortuitous circumstance which caused the sales slips upon which defendant's exhibits 20-23 were based to survive. However, there is nothing in the record to indicate that the periods in 1969 reflected in Dx 20-23 were not typical.

So far as full-time employees are concerned, and apart from incentive payments, the pay differential in favor of salesmen as against saleswomen (thus far only one of each) was based upon economic considerations and in no way upon sex.

The wage compensation disparity between part-time salesmen and part-time saleswomen, excluding from consideration incentive payments, presents a different story. The part-time salesmen for the period January 26, 1969 to April 15, 1969 on the average were responsible for $44.79 of sales per hour as against $37.47 by saleswomen, or 20% more.* The average part-time salesmen was paid $1.93 per hour in wages as against $1.61 per hour to part-time saleswomen, or 20% more.** For the period August 10, 1969 to October 18, 1969 the part-time salesmen generated on the average 46.43 dollars of sales per hour as against 43 dollars by saleswomen, or 8% more. The average salesman was paid during the period $1.91 per hour

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* These dollar figures and percentages have been computed by the Court from Dx 20-21.

** See preceding footnote.

in wages as against $1.65 per hour to saleswomen, or 16% more.**

In the case of part-time sales personnel no records of sales per hour were introduced in evidence for periods of time other than the two discussed. There is no suggestion that there was a deliberate destruction of records by defendants other than in the normal course of business. It is reasonable to infer that had the records been available their disclosure would not have been significantly different from that shown by the analysis of Dx 20-23, just discussed.

The conclusion is warranted that the compensation disparity (apart from incentives) in favor of the part-time salesmen cannot be supported by any economic benefits which defendants received from the job performances of the salesmen. The difference in wage rates paid to the salesmen and saleswomen was not based upon factors other than sex.

This is borne out by individual compensation and economic benefits comparisons. Two of Greenbank's part-time female employees, Alice Raker and C. Jarrell, were responsible for a higher per hour dollar volume of sales than three of the part-time male employees, McGonegal, Law and Layton, during the period from August 10, 1969 to October 18, 1969. A division of Jarrell's gross earnings (less incentive) by hours worked and a similar computation for the part-time salesman discloses that Jarrell received a lower hourly rate than all three of these part-time salesmen, even though her gross sales per hour were more than that made by three of the five part-time salesmen. See Dx 22 and 23. Silbert conceded that it was possible in a given location that an excellent saleswoman might generate more sales than a very

** See preceding footnote.

poor salesman, although he said that normally this would not happen. At Greenbank this did occur.

Incentive compensation presents its own unique problem and necessitates separate consideration. Its complex nature and the purpose it was designed to serve have been previously discussed. Here it need only be noted that the incentives paid depended upon differences in the style, quality, price and markup between the merchandise sold in the two departments. Except as these factors were themselves based upon the sex of the customers, the incentive differentials were not based in any way upon sex, and were sanctioned by 29 C.F.R. § 800.116(e).* Although the example given in this regulation presupposes the hiring of males and females indiscriminately in each

* Section 800.116(e) reads:

(e) *Commissions.* The establishment of different rates of commission on different types of merchandise would not result in a violation of the equal pay provisions where the factor of sex provides no part of the basis for the differential. For example, suppose that a retail store maintains two shoe departments, each having employees of both sexes, that the shoes carried in the two department differ in style, quality, and price, and that the male and female sales clerks in the one department are performing 'equal work' with those in the other. In such a situation, a prohibited differential would not result from payment of a lower commission rate in the department where a lower price line with a lower markup is sold than in the other department where the merchandise is higher priced and has a higher markup, if the employer can show that the commission rates paid in each department are applied equally to the employees of both sexes in the establishment for all employment in that department and that the factor of sex has played no part in the setting of the different commission rates.

of two shoe departments, it is not for this reason irrelevant to the instant case. Were this a case in which the defendant had arbitrarily employed only females in the department paying the lower commissions, it might be. But this did not occur. Here the necessity of close bodily contact between customers and sales personnel made it logical and necessary for salesman to be employed in the men's department and salesladies in the women's department.

In its operation the ratio of incentive pay to gross sales was only about .2% more in the case of salesmen than in the case of saleswomen. This compensation differential distinction was based solely upon factors other than sex.

Conclusion

Plaintiff is entitled to an injunction restraining defendants from (a) further violating the Equal Pay Act at the Greenbank store, and (b) from withholding back wages due salesladies at the Greenbank store because of violation of the Equal Pay Act. The parties have agreed to attempt to stipulate the amount of back wages which defendants must pay.

29 U.S.C. § 255 bars all claims for unpaid "minimum wages" except those accruing within two years prior to the commencement of an action unless the violation of the Act was willful. This provision is applicable to unpaid wage claims resulting from sexual discrimination. 29 U.S.C. § 206(d)(3). Here the violation of the Act was not willful. The complaint was filed on December 6, 1966. All claims for back wages accruing prior to December 6, 1964 are therefore barred.

Plaintiff claims that defendants are liable for interest on the wages which should have been paid to

the salesladies but were not. Without passing upon the power of the Court to make an award of interest,* it is denied as a matter of discretion.

The jobs performed by the salesman and salesladies were not identical. Defendants could have interpreted the Act in good faith to apply only if they were. *Cf. Hodgson* v. *American Can Co.*, 317 F.Supp. at 161-62. Not until three years after the action was begun was there a definitive holding in this Circuit in *Shultz* v. *Wheaton Glass Co., supra*, that the Act was intended to reach jobs that were substantially equal and that they need not be identical to be subject to its terms. 421 F.2d at 265.

Furthermore, the experience of Robert Hall at its other stores reflecting greater benefits from the efforts of salesmen than salesladies was prima facie justification for the distinction in wage rates at Greenbank. Defendants cooperated with the Government and attempted to explain to it the bases for their compensation policy. In continuing it they acted upon the advice of counsel.

Defendants have acted in good faith and upon reasonable grounds in compensating sales employees in the men's department at higher rates than sales employees in the ladies' department. Although some of the salesladies were paid less than their due under

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* Power to award interest was assumed to exist without discussion in *Shultz* v. *Wheaton Glass Co.*, 64 CCH Lab. Cas. 44,489, 44,495 (D. N.J. 1970), *decision upon remand following Shultz* v. *Wheaton Glass Co.*, 421 F.2d 259 (3d Cir. 1970). The power to make such an award was denied in *Hodgson* v. *American Can Co.*, 317 F.Supp. 152, 159-60 (W.D. Ark. 1970).

the law, equitable considerations on balance support a denial of an award of interest on the back pay to which they are entitled.

Wilmington, Delaware

April 16, 1971

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 3289

JAMES D. HODGSON, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

ROBERT HALL CLOTHES, INC., a corporation, and ROBERT HALL CLOTHES GREENBANK ROAD CORP., a corporation, DEFENDANTS

MEMORANDUM OPINION AND ORDER ON DEFENDANTS' MOTION FOR REARGUMENT

STEEL, J.:

The motion of defendants for reargument asserts that the Court, while comparing the amount of sales per hour generated by the part-time sales force, erroneously overlooked the most significant fact of economic benefit to defendants, namely the amount of profits produced per hour by the part-time sales force.

The sales per hour comparisons set forth in the opinion were based upon the sales generated by each of the part-time sales personnel. Defendants' motion presents no data from which the amount of profit produced per hour by each of the part-time sales personnel can be calculated. Defendants endeavor to present such a comparison by relying upon computations premised basically upon DX 17. This exhibit reveals that in 1969 * the gross profit of the men

* 1969 was the year in which the two periods occurred in which sales volume of the individual part-time sales personnel was compared.

and boy's department was 46.79% of the department's sales, and that the gross profit of the ladies' and girls' department was 36.43% of that department's sales. Defendants' arguments all proceed from these two statistics. However, they provide no clue as to what the gross profit per hour may have been upon the sales generated by the individual part-time sales personnel. Yet, it is this latter comparison which is the significant one, just as the per hour sales comparisons of the individual part-time personnel (discussed in the opinion) was the meaningful one.

The motion for reargument is denied.

Wilmington, Delaware

May 10, 1971

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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1615

PETER J. BRENNAN, Secretary of Labor,
Petitioner,

v.

ROBERT HALL CLOTHES, INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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OPINIONS BELOW

The decision of the Third Circuit Court of Appeals (Pet. 19-39) is reported at 473 F.2d 589. The decision of the United States District Court for the District of Delaware (Pet. 42-72) is reported at 326 F. Supp. 1264.

JURISIDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether with respect to a clothing store, as to which the Courts below held that respondents justifiably assigned only female salespersons to the Ladies' Department and only male salespersons to the Men's Department, there was error in their unanimous holdings that lower wages paid to female salespersons were lawful under Section 206 (d) (1) (iv) of the Fair Labor Standards Act as "based on any other factor other than sex" where respondents proved that the disparate pay scales were based on the greater profits per hour and greater sales per hour produced in the Men's Department due to the difference in the economic characteristics of the merchandise sold in that Department compared with that sold in the Ladies' Department, and were not based on the sex of the salespersons.

2. Whether the court of appeals erred in (a) unanimously affirming the district court's conclusion that respondents sustained their burden of proof as to their full-time salespersons, and (b) reversing by a divided vote the district court's determination that respondents did not carry their burden of proof as to their part-time salespersons.

STATUTE INVOLVED

Section 6 (d) (1) of the Fair Standards Act of 1938, as amended, 29 U.S.C. 206 (d) (1), was added to the law as part of the Equal Pay Act of 1963, Pub Law 88-38, 77 Stat. 56. It provides:

> "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employ-

ed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

STATEMENT

1. The Undisputed Facts

Respondents operate a retail clothing store located on Greenbank Road in Wilmington, Delaware (the "Greenbank Store"), which sells primarily fitted apparel. The Greenbank Store is divided into two departments, one in which only men's and boys' clothing is sold (the "Men's Department"), and the other in which only women's and girls' clothing is sold (the "Ladies' Department") (A 43-44, Pet. 44-45).[1] From the opening of this store in 1962, respondents have followed a policy of having only men sell the clothing offered in the Men's Department and only women sell the clothing offered in the Ladies' Department (A 296, 296c). There is no interchange of selling personnel between the two departments (A 45).

1. All references preceded by the letter "A" are to the joint appendix filed in the court of appeals, a copy of which was filed with the clerk of this Court by petitioner.

Respondents' policy (which is not under challenge) was adopted because of the frequent necessity in connection with the sale of clothing for close bodily contact between the salesperson and the customer (Pet. 47). An overwhelming percentage of apparel sold in both departments consist of items of clothing requiring bodily fit, i.e., suits, dresses, coats, slacks, skirts, etc.; only an insignificant number are items of haberdashery and accessories (A 454-55). Hence, the salesperson is required to assist with open zippers; to touch the body of a customer near private parts in connection with the measurement of the crotch, seat, waist, chest or inseam; and to touch other areas of the body while assisting in try-ons (A 296, 296a, 296c, Pet. 47). Both salesmen and saleswomen also have occasion in the course of selling clothing to observe their customers in various stages of undress in connection with try-ons (A 296, 296a, 296c, Pet. 47). Therefore, it would embarrass both and inhibit sales unless the salesperson and customer were of the same sex (Pet. 47).

The merchandise sold in the Men's and Ladies' Departments bear sharply different economic characteristics. The clothing in the Men's Department, on the average, bears considerably higher markups and lower markdowns than that in the Ladies' Department (A 440-44, 480-82, Pet. 56-57). Substantially more of higher priced clothing is carried in the Men's Department than in the Ladies' Department (A 242, 478-79, 483-86, Pet. 53-54). The average unit selling price of apparel is substantially higher in the Men's Department than in the Ladies' Department (A 483-86, Pet. 54). Because of these differences in the economic characteristics of the merchandise sold in the Men's and Ladies' Departments, both the dollar volume of sales and the percentage of gross profits to sales have con-

sistently been significantly higher in the Men's Department than in the Ladies' Department (A 451). Moreover, the salesmen have consistently produced more gross profits per hour of work and sold more merchandise per hour of work in terms of dollars than their female counterparts (A 487).[2]

Full-time sales personnel in both departments[3] are compensated by a weekly salary plus incentives; part-time sales

2. The following table from the opinions of the district court and the court of appeals (Pet. 21, 65) is particularly instructive:

SCHEDULE OF HOURLY SALES, EARNINGS AND GROSS PROFIT

Year	Sales Per Hour	Excess M over F	Per Hour Earnings	Excess M over F	Gross Profit Per Hour	Excess M over F
Men's & Boys'						
1963	*38.31	40%	*2.18	25%	*15.52	72%
1964	40.22	32%	2.46	32%	16.55	74%
1965	54.77	64%	2.67	48%	23.85	114%
1966	59.58	73%	2.92	50%	26.66	134%
1967	63.14	71%	2.88	45%	28.74	133%
1968	62.27	70%	2.97	47%	29.21	127%
1969	73.00	77%	3.13	45%	34.16	127%
Ladies' & Girls'						
1963	*27.31		*1.75		*9.00	
1964	30.36		1.86		9.49	
1965	33.30		1.80		11.14	
1966	34.31		1.95		11.43	
1967	36.92		1.98		12.36	
1968	37.20		2.02		12.91	
1969	41.26		2.16		15.03	

* These represent dollar figures.

3. From shortly after its opening in 1962, there have been only two full-time salespersons at the Greenbank store, one each in the Men's and Ladies' Departments (Pet. 50-51).

personnel[4] are compensated by an hourly wage plus incentives.[5] Since 1962 the male sales employees at the Greenbank store have received higher regular compensation than female sales employees (A407-11, Pet. 51-52). Unlike the unique situation involving sales personnel, all non-sales employees at Greenbank, such as cashiers, wrappers, tailors and porters, whether they be male or female, have at all times been compensated at the same salary or wage rate, i.e., all cashiers are compensated equally, all tailors equally, all wrappers equally and all porters equally (A 368).

4. The number of part-time sales personnel has varied from two to five for each department (Pet. 50-51).

5. The incentive compensation system is designed to move merchandise and increase profits. Different items of merchandise carry different amounts of incentive compensation (Pet. 52-54). The incentives are based upon various factors, such as type of garment, number of garments sold to a given customer at one time, price, inventory age of garment, and the like. The particular amount of incentive compensation placed upon an item of merchandise, regardless in which department sold, is determined not by whom the item is sold, but on the need to sell the particular item, the markup on the item, the profitability to the store on the sale of the item, the length of time the item is in the store, the ease of selling the item and its selling price (A 236-38, Pet. 53). In both the Men's and Ladies' Departments, the higher the price of the merchandise the greater the incentive compensation (Pet. 53). Merchandise in the Men's Department remains in the store longer before it is sold than merchandise in the Ladies' Department. The longer merchandise remains in the store the higher the incentive when it is sold. Using these criteria, the salesmen at Greenbank regularly earn more in incentive compensation than the saleswomen (Pet. 54). The district court found that the differences in incentive compensation depend not on the sex of the salesperson but on the differences in economic characteristics of the particular items of merchandise being sold and held that the incentive system was lawful both as to full-time and part-time salespersons (Pet. 69-70).

2. The Proceedings and Opinions Below

The Secretary of Labor instituted this action in 1966 in the United States District Court for the District of Delaware to enjoin respondents' alleged violation of the Equal Pay Act of 1963, 29 U.S.C. 206(d)(1), with respect to the wages (starting, progressive and incentive) paid to the female sales employees at the Greenbank store, and to restrain the withholding of any wages found due as a result of the alleged vioation (A 8-22). At trial respondents principally urged that (a) the work performed by the salesmen required greater skill, effort and responsibility than that performed by the saleswomen, and (b) the different economic characteristics of men's and women's apparel resulting in greater benefits to respondents from the sales by the salespersons in the Men's Department than from the sales by the salespersons in the Ladies' Department constituted a factor other than sex which justified the disparate wages.

The district court (Steel, J.), although specifically recognizing that the job of salesperson in the Men's Department could not reasonably be performed by women and that the job of salesperson in the Ladies' Department could not reasonably be performed by men (Pet. 47),[6] held that the Equal Pay Act was applicable (Pet. 47-50), and that the Secretary had made out a prima facie case against respond-

6. The district judge held that:

"The jobs performed by salesmen and salesladies, respectively, are not reasonably susceptible of performance by both sexes because of the nature of the jobs. One is a 'male' job and the other a 'female' job" (Pet. 47).

"Here the necessity of close bodily contact between customers and sales personnel made it logical and necessary for salesmen to be employed in the men's department and salesladies in the women's department" (Pet. 70).

ents for violating the statute (Pet. 61). The district court held that the jobs of the sales personnel in the Men's and Ladies' Departments were equal, requiring substantially equal skill, effort and responsibility (Pet. 55-61).

Turning then to respondents' affirmative defense that the wage differentials in favor of the salesmen were authorized by Section 206(d)(1)(iv) of the Act because based on a factor other than sex, namely, greater sales and profits to respondents attributable to the different economic characteristics of the merchandise being sold in the Men's Department, the district court held that such "economic considerations" came within the statutory exception and that as to the full-time employees at the Greenbank store respondents had met their burden of proving that "the pay differential in favor of salesmen as against saleswomen . . . was based upon economic considerations and in no way upon sex" (Pet. 66, 67, 69. See also Pet. 24). The district court also upheld the validity of the disparities in incentive compensation paid to all sales employees in both the Men's and Ladies' Departments. As to part-time employees, the district court concluded that respondents had not met their burden of proving that the disparity in wages was attributable to "economic benefits" (Pet. 68). The court therefore granted the Secretary's prayer for relief as to the basic wages of the part-time employees, but declined to award such employees interest on the withheld wages which it ordered respondents to pay (Pet. 70-72).[7]

Neither party being satisfied with the result in the district court, both appealed to the United States Court of Appeals for the Third Circuit (A 556-558). Respondents challenged that part of the district court's decision which concluded that they discriminated in the payment of wages

7. Respondents motion for reargument was thereafter denied by the court (Pet. 73-74).

to part-time saleswomen at the Greenbank store. The Secretary appealed the district court's determination that respondents did not violate the statute by the payment of higher wages to the full-time salesmen, as well as its refusal to award interest on the back wages ordered to be paid the part-time employees. However, the Secretary did not appeal from the district court's determination that the differential in incentive compensation in favor of both full-time and part-time salesmen did not violate the Act.

The court of appeals unanimously affirmed the district court's determination in favor of respondents on the wages paid full-time salespersons; it reversed by a divided vote the district court's conclusion that the wage differential in favor of part-time salesmen violated the Act. In so doing, the court unanimously held that "the district court was correct to hold in this case that economic benefits to an employer can justify a wage differential" (Pet. 27).[8]

The majority reversed the lower court's decision as to part-time salespersons because the Equal Pay Act does not require "the employer to justify his base salary by correlating it to individual performance" (Pet. 34). The majority concluded that

> "The overwhelming evidence which showed that the men's department was more profitable than the women's was sufficient to justify the differences in base salary. These statistics proved that Robert Hall's wage differentials were not based on sex but instead fully supported the reasoned business judgment that the sellers of women's clothing could not be paid as much as the sellers of men's clothing. Robert Hall's executives testified that it was their practice to base their wage rates on these departmental figures.

8. Judge Van Dusen's partial dissent specifically indicates his agreement on this point. See Pet. 36 n.1.

> While no business reason could justify a practice clearly prohibited by the act, the legislative history . . . indicates a Congressional intent to allow reasonable business judgments to stand. It would be too great an economic and accounting hardship to impose upon Robert Hall the requirement that it correlate the wages of each individual with his or her performance. This could force it toward a system based totally upon commissions, and it seems unwise to read such a result into § 206 (d) (iv)" (Pet. 34-35).

On this point alone Judge Van Dusen dissented, stating only that he concluded that the district court's "findings of fact" as to part-time employees were "not clearly erroneous"(Pet. 36).

REASONS FOR DENYING THE PETITION

1. The Opinion Of The Court Of Appeals Is Manifestly Correct.

The unanimous conclusion of the four judges below that under the Equal Pay Act "economic benefits to an employer can justify a wage differential" between jobs which require substantially equal skill, effort and responsibility (Pet. 27) is fully supported by the statutory language, its legislative history, the Department of Labor's own published interpretations of the Act and the decided cases.

A. We begin, as did the court of appeals (Pet. 27-28), with the language of the statute itself. In plain and unambiguous terms, § 206 (d) (1) authorizes the payment of disparate wages for jobs requiring equal skill, effort and responsibility performed under similar working conditions when based upon "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) *a differential based*

on any other factor other than sex." (Emphasis added.) On its face, therefore, § 206 (d) (1) (iv) authorizes the payment of disparate wages if based on *any* factor other than sex.

In an attempt to read the word "any" out of the statute, petitioner argues, in effect, that Congress cannot possibly have intended such a result, but really meant to authorize disparate wages for equal work only in those cases in which the factor relied upon is job related, i.e., is a function of the individual worker's qualifications for, or skill, effort and responsibility in the performance of, his or her job (Pet. 13-14).[9] The statutory language, however, has no such limitation and authorizes differentials in wages resulting from any factor other than sex whether or not related to an individual's performance on the job. In the case of selling activities, the dollar sales per selling hour, and, more significantly, the profits per selling hour, are the economic factors which must necessarily have a major impact on wages paid; thus, where significant differences in these factors are present, differentials in wages may result which the statute by its terms specifically approves.

A requirement that a "factor other than sex" be related to job performance would strain beyond reason the plain language of the Act and would eliminate entirely any significance of those words. The Act specifically authorizes

9. The Secretary's position as to the governing test has changed with each brief filed on his behalf. In the main brief submitted to the court of appeals, the standard suggested was "a factor . . . related to job performance." In the reply brief to the court below, the Secretary's position shifted and the proper test was said to be a factor related to job performance *or* "typically used in setting wage scales" (Pet. 26). In the petition filed with this Court, the Secretary now argues that the test is a factor which reflects "in some measure the individual job performance, or qualifications for the job, of each employee" (Pet. 13-14).

pay differentials in spite of "equal" job performance. Thus, a pay differential based upon a seniority system is not a violation of the Act, though unrelated entirely to job performance. Moreover, by expressly authorizing pay differentials based upon "a merit system" or "a system which measures earnings by quantity or quality of production", Congress thereby exempted from the Act all differentials based upon factors related to job performance. Therefore, the final exception, i.e., "a differential based upon any other factor other than sex," means exactly what it says, to wit: "any other factor other than sex." It is not restricted to factors related to job performance and the Act cannot be rewritten by the Secretary to engraft such a restriction upon it. For the courts below to have held otherwise would have violated two cardinal principles of statutory construction: (a) The words of a statute must be construed in their ordinary sense unless a contrary intention is apparent, *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 617-18; and (b) "[S]ignificance and effect shall, if possible, be accorded every word". *Market Co.* v. *Hoffman*, 101 U.S. 112, 115; *Petition of Public National Bank of New York*, 278 U.S. 101, 104.

B. As the court of appeals unanimously concluded, the legislative history of the Equal Pay Act also makes it clear that Congress did not intend to deny an employer the right to compensate differently employees of opposite sexes who perform equal work, provided the employer's compensation policy was based upon legitimate business reasons and not upon sex (Pet. 30-32). The House Committee report explains that the statute contains three "specific exceptions and one broad general exception" which it included because "it is impossible to list each and every exception"

(H. Rept. 309, 88th Cong., 1st Sess., quoted by the court below at Pet. 31). See *Shultz* v. *First Victoria National Bank,* 420 F.2d 648, 656-57 (C.A.5). Representative Griffin explained Section 206(d)(1)(iv) to the House as follows:

> "I should like to focus the attention of the gentleman upon small roman numeral iv, at the top of page 3 which makes clear and explicitly states that a differential based on any factor or factors other than sex would not violate this legislation. In other words, even though jobs involve the same skill, equal effort, equal responsibility, and are performed under the same working conditions, if there is any other factor not based on sex upon which a differential is based, then no violation of this law can be found. Roman numeral iv is a broad principle, and those preceding it are really examples: such factors as a seniority system, a merit system, or a system which measures earnings on the basis of quality or quantity of production. The other body saw fit to leave out references in the bill to a merit system, a system which measures on the basis of quality and quantity, and a seniority system, and included only the broad language found in roman numeral iv of our bill. However, it should be clear that under either bill differential based upon any factor other than sex is not a violation." 109 Cong. Rec. 9203.[10]

Further the legislative history indicates as Representative Goodell, a key sponsor of the Act, stated:

> "I think this point should be clarified. The gentleman has made a good point that there are many fac-

10. It deserves comment that petitioner extracts only four words from the above quoted statement of Representative Griffin, and by using these words out of context tries to imply that exception iv of the Equal Pay Act has a limited application (Pet. 13). The full statement of the Congressman quoted above indicates the Secretary's distortion thereof and that exception iv was intended by Congress to have the broadest application.

> tors that can be taken into consideration in working out differentials of pay among employees, that the gentleman has mentioned, which would be proper under this legislation so long as they were based on those factors and not on the basis of whether employees are women or men. If any employer wants to set up a system where he pays a job differential relating to absenteeism, regardless of sex, he can do that. If he wants to set up a system of differentials in pay relating to insurance costs of all employees, regardless of sex, he can do that. There are a good many other examples that could be given—all valid under this bill as written, provided the employer does not base his differentials on sex." 109 Cong. Rec. 9206.

There is no reference in the entire legislative history to the limitation of job-relatedness which the petitioner seeks to engraft on the statutory language.[11]

C. The regulations and guidelines issued by the Department of Labor itself similarly recognize the basic principle that economic factors constitute a basis for discrimination in wages between the sexes. Section 800.116(e) of the Wage-Hour Administrator's Interpretative Bulletin, 29 C.F.R. § 800.116(e), and Section 34d07 of the Field Office Handbook issued by The Wage and Hour and Public Contracts Division of the Department of Labor both specifically validate the payment of different rates of commission for merchandise sold in different departments within one establishment where the merchandise sold in the two depart-

11. The Wage-Hour Administrator's Interpretive Bulletin explains the statutory exceptions in language reminiscent of the House Report and speaks of "three specific exceptions and one broad general exception" 29 C.F.R. § 800.140. The qualification advanced in the Secretary's petition that the general exception only pertains to job related factors also does not appear therein, or indeed anywhere in the regulations.

ments differs in style, quality, price, markup, sales volume, turnover and ease of selling, although the salesmanship required of the individual worker in the two departments constitutes equal work.[12] As the court of appeals observed, this makes "good business sense" and should apply even if the method of compensation is "base salary rather than a commission" (Pet. 29).[13]

D. The decided cases which have considered the same issue raised herein all have recognized that a difference in economic benefits to an employer justifies a difference in wages without reference to individual job performance. *Shultz* v. *Wheaton Glass Co.*, 421 F.2d 259, 267 (C.A. 3), cert. denied, 398 U.S. 905; *Wirtz* v. *Dennison Mfg. Co.*, 265 F. Supp. 787, 790 (D. Mass.); *Shultz* v. *Saxonburg Ceramics, Inc.*, 314 F. Supp. 1139, 1145-46 (W.D. Pa).[14] See also Pet. 31-32. No decision holds to the contrary; not even the opinion of the dissenting judge in the court below.

12. The two provisions appear in the joint appendix at A 488, in the Petition 69, and are quoted in full in footnote 9 of the opinion of the court of appeals (Pet. 28-9).

13. It would seem that by his failure to appeal the district court's adverse determination as to respondents' incentive compensation system, petitioner concedes as much at least as regards the incentive compensation paid to all salespeople at the Greenbank store. The ruling on incentive compensation is as basic as the holding on principal compensation. The district court found that the differences in incentive compensation depend not on the sex of the selesperson but on the differences in economic characteristics of the items of merchandise being sold (Pet. 69-70). The amount of incentives paid to salespersons depend on price, quality, markup, markdown and style of merchandise. The salesmen receive higher incentive compensation because the merchandise in the Men's Department has higher markups, lesser markdowns and is in the higher price range than the merchandise in the Ladies' Department. Just as in principal compensation, it is the economic characteristics of the merchandise alone which determines the incentive compensation in both departments (A 236-240).

14. While the employer did not prevail in all of these cases, the reason lies in a failure of proof—the employer's failure to prove that it received the claimed economic benefits—not in the absence of a defense cognizable under the Equal Pay Act.

While this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* did limit the use of employment and promotion criteria, neutral on their face but which had the effect of excluding blacks from employment opportunities, to only those which can be shown to be related to job performance, that decision in a different statutory framework has no impact on this case. First, the *Griggs* holding relates to a situation wherein the evidence failed to justify the exclusion of blacks from traditionally white jobs, while in our case both of the courts below concluded that females, for reasons of business necessity, could not perform the selling jobs in the Men's Department. Clearly any employer who arbitrarily excludes female employees from jobs performed by males would violate the Equal Pay Act. But such is not this case. The courts below held, and it was neither challenged by the Secretary below nor is it challenged in his petition, that there were legitimate business purposes which prevented saleswomen from selling men's clothing (p. 7, n. 6, *supra*). See also Pet. 32. Second, in *Griggs* the pertinent administrative regulations of the EEOC and the legislative history of the statute supported the result reached, 401 U.S. at 433-36; here they run counter to the petitioner's argument. Finally, *Griggs* is inapposite because it "did not deal with justification of a wage differential, and this is the issue we are considering" (Pet. 32).

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With the language of the statute, its legislative history, the Labor Department's regulations and the decided cases all being adverse to petitioner's position, this case does not merit further review by this Court.

2. The Facts In This Case Are Unique And The Opinions Below Will Not Have Broad Application.

While the petitioner would have the Court believe that the decision below is one of enormous impact which threatens the effective enforcement of the Equal Pay Act (Pet. 11-12, 14), such is hardly the case. Petitioner cavalierly brands the decision below as one which will affect the entire retail-sales industry and asserts that it bears upon forty-three pending cases, but such rhetoric can only impress one who ignores the facts of this case.

The salient factors in the record which warranted the result reached herein are: First, respondents sell fitted apparel. Second, the sales force is justifiably segregated by sex so that women sell only to females and men to males. Third, the line of merchandise offered for sale by the male sales force is of higher price, bears higher markups and lesser markdowns, is of better quality and generates higher profits than the merchandise offered for sale by the female sales force. Within this factual context the court below held that "in this case" the economic benefits realized by the employer from the sale of the merchandise offered for sale in the Men's Department justified the higher wages paid to salesmen (Pet. 27). The decision below therefore only will have an impact on cases against retailers selling fitted apparel of disparate price lines to men and women in separate departments of one establishment.

Two observations with respect to the above point are warranted. The first is that the decisions below turn on the particular economic situation present in this record. The second is that counsel have been unable to find throughout the entire range of commerce another line of products where the sex of the salesperson is determined by the product.

The sale of men's and women's apparel is unique in this respect and hence, when coupled with the record in this case, is uniquely excluded from the scope of the Equal Pay Act.

Once the principle that a defense under exception iv need not be limited solely to individual job performance is disposed of, nothing of general significance remains in this record which warrants review by this Court. The outcome reached herein turns on the particular facts of this case which represent even in retailing a highly unusual combination of circumstances based on the economic characteristics of particular types of merchandise, justifying respondents' differentials in wage compensation.

The enforcement battles under the Equal Pay Act have focused not on the affirmative defenses enumerated in Section 206(d)(1), but on the problem of defining equal work. The overwhelming number of litigated cases in this area have dealt with the issue of whether two jobs require substantially equal skill, effort and responsibility and are performed under similar working conditions. See Annotation 7 ALR Fed. 707. Nothing in the decision below portends a shift in the battle, for there is no way to read the opinions below as promising any easy escape from the strictures of the Equal Pay Act for any and all defendants who rely on the exception found in Section 206(d)(1)(iv).

Thus, the decision below will have no adverse impact on the enforcement of the statute. In contrast, the Secretary's position, if adopted, would have an adverse impact on commerce. Since the cost of sales is a major component of business overhead and has a direct bearing on profits, and since particular lines of merchandise can economically only bear certain reasonable selling costs, an employer faced with the choice of paying base salaries without reference

to the economics of the merchandise being sold or abandoning a salary or wage system in favor of straight commission compensation is very likely to choose the latter course. As the court below observed, the Secretary's position could force respondents "toward a system based totally upon commissions" (Pet. 34). To read the limitation of job-relatedness into the Equal Pay Act would mean that under the Act the sole permissible method of compensation for selling would be commissions, else how could individual performance be measured? This would discard every existing pay arrangement for sales employees who are compensated by wages or salaries and would make illegal all union contracts based on this system, thus outlawing what is surely the most commonly used method of compensation throughout the United States. It is certain that Congress never intended by the Equal Pay Act to effect such a fundamental change in the wage and salary compensation system which is so pervasive throughout the country. Again as the court below observed, "it seems unwise to read such a result into" the Equal Pay Act (Pet. 34-35).

3. Whether A Party Sustains Its Burden Of Proof Is Not A Matter Warranting Review.

The issue as to whether the court of appeals was correct in reversing the district court's determination that respondents failed to meet their burden of proof as to part-time employees hardly comes within the contemplation of Rule 19 of the Rules of this Court as a special and important question warranting review. The court of appeals majority held that the evidence supporting the economic benefit defense was "overwhelming" and justified the differences in compensation (Pet. 34). The pay differentials were based upon the regular departmental accounting figures

which appear *supra* at p. 5 n.2 and were fully justified by that data.

We did not urge below, nor did the court of appeals hold, that any disparity in economic performance will justify a differential in wages. If the economic relationships are not reasonably related to the differences in pay, the employer's economic justification obviously would fail. But the failure would not be due to the absence of the principle, but because of the employer's failure to prove the justification. So long as there is a reasonable relationship between the economics of the situation and the differential in pay, there legitimately is present a "factor other than sex".

CONCLUSION

For all of the foregoing reasons, we submit that the petition for certiorari should be denied.

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